TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 149. 232.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, RUSSELL BLEECKER, AND MARK RAGGALLEY, APPELLANTS,

vs.

GEORGE R. BIDWELL, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 17, 1899.

(17,325.)

(17,325.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 740.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, RUSSELL BLEECKER, AND MARK BAGGALLEY, APPELLANTS,

vs.

GEORGE R. BIDWELL, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 5, 1899.

1 Circuit Court of the United States, Southern District of New York.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, RUSSELL BLEECKER, and MARK BAGGALLEY
against
GEORGE R. BIDWELL.
} In Equity.

To the honorable the judges of the circuit court of the United States in and for the southern district of New York:

William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker and Mark Baggalley, copartners doing business in the city of New York, State of New York, bring this their bill of complaint against George R. Bidwell.

I. And thereupon your orators complain and say that the said defendant George R. Bidwell is, and at all the times hereinafter mentioned was, the collector of customs of the United States for the port of New York.

II. That your orators are copartners engaged under the
2 firm name of Mourilyan, Heimann & Co. in importing teas from Japan into the United States. That Russell Bleecker, one of the complainants above named, is a citizen of the United States, residing in the State of New York.

III. That heretofore and during the month of November, 1897, your orators imported into the United States, and entered at the custom-house at the port of New York, the several invoices of tea on the several dates hereinafter set forth, and thereupon, as to each invoice, applied to the defendant as collector of customs at the said port, for permission to take possession of said goods, and thereupon said collector, as to each and every of said invoices of goods hereinafter set forth, refused to permit these orators to take possession of the same, but retained the same in his own possession, claiming and pretending that he was thereunto authorized by the provisions of an act of Congress, approved March 2, 1897, and entitled "An act to prevent the importation of impure and unwholesome tea."

IV. Your orators further show that the said defendant continues to refuse to release the said goods from his possession, and to permit or allow your orators to take possession of the same, and your orators further allege that the said defendant claims and pretends that he is entitled so to refuse to permit your orators to take possession of said teas and to dispose of the same, on the ground that samples of said teas, of each of said several invoices hereinafter set forth, have been taken by examiners appointed under the alleged authority of the said act of Congress, and compared with certain other samples of other teas selected by the Secretary of the Treasury of the United States, and set up as standard samples of teas under the alleged authority of the said act of Congress, and that the samples so taken from the said teas hereinafter set forth were inferior in

some or all of the respects designated in said act of Congress,
3 either as to purity, quality or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States.

V. Your orators further allege that the said defendant claims the right to retain said teas for the period of six months, and thereupon to cause the same to be destroyed, and the said defendant demands of your orators that they shall give security satisfactory to the defendant that if said teas shall be released to them, your orators, they will forthwith export the said teas out of the limits of the United States, and will submit the invoices and various papers relating to said teas to be marked by the said defendant as teas "condemned under the laws of the United States."

VI. Your orators further allege that the several invoices of teas hereinbefore referred to are more particularly described as follows:

First. 16,500 pounds of tea in 250 half chests, imported in ship *Braemar* and entered at the custom-house November 11, 1897, under the number 179,101, and now in the warehouse No. 582 Water street, in the city of New York, in the custody of the said defendant, under bond that the same shall not be released without the permission of the said defendant, and that the said 250 half chests are marked as follows:

H K #738/741, 100 hfc.
H R #742/745, 100 "
H L #746/747, 50 "

Second. 14,255 pounds of tea in 216 half chests, imported in ship *Olympia* and entered at the custom-house November 15, 1897, under the number 180,811, and now in the warehouse No. 192–194 Cherry
4 street, in the city of New York, in the custody of the said defendant, under bond to the United States that the same shall not be released without the permission of the defendant. The said half chests are marked as follows:

H Y 750/753, 100 hfc.
H P 754/758, 116 "

Third. 16,000 pounds of tea in 225 half chests, imported in the ship *Frey*, and entered at the custom-house November 13, 1897, under the number 179,936, and now in the warehouse No. 192–194 Cherry street, in the city of New York, in the custody of the said defendant under bond to the United States that the same shall not be released therefrom without the permission of the defendant. That the marks upon said half chests are as follows:

DC 329/330, 50 hfc.
DD 331/332, 50 "
ELEPHANT 333/337, 125 "

Fourth. 2,450 pounds of tea in 35 half chests, imported in the ship *Benalder*, and entered at the custom-house November 19, 1897, under the number 183,587, and now in the warehouse No. 192–194 Cherry street, in the city of New York, under bond to the United

States that the same shall not be released without the permission of the said defendant. That the marks on said half chests are as follows:

JAF #1.

Fifth. 27,664 pounds of tea in 408 half chests, imported in the ship *Macduff*, and entered at the custom-house December 31, 1897, under the number 207,994, and now in the warehouse No. 582 Water street, in the city of New York, in the custody of the said defendant, under bond to the United States that the same shall not
5 be released therefrom without permission of the defendant. That the marks upon said half chests are as follows:

		$\frac{GY}{A}$	# 89,	20 hfc.
		"	90 / 1	55 "
K	W	M	92 / 6,	134 "
R	N	Y	97 / 101,	135 "
C	O	/ M	103,	11 "
	"		104,	3 "
	"		105,	5 "
X	P	X	106,	20 "
	"		107,	10 "
	"		108,	15 "

VII. And your orators further show that the value of said teas is, as to each of the first three invoices and the fifth invoice, more than one thousand dollars for each of said invoices, and as to the fourth of said invoices, more than one hundred dollars.

VIII. Your orators further show that your orators claim and insist that the said act of Congress, approved March 2, 1897, and entitled "An act to prevent the importation of impure and unwholesome tea," is in all respects null and void, and of no effect, for the reason that the same is contrary to the provisions of the Constitution of the United States, in that said act purports to delegate to the Secretary of the Treasury power and authority to legislate as to the quality, purity and fitness for consumption of the teas imported by your orators, and to authorize the defendant to seize, hold and destroy said teas, and deprive your orators of their property in the same without due process of law, and that in this suit the matter in dispute, to wit, the value of the said teas, and the right to import teas, exclusive of interests and costs, exceeds the sum or value
6 of two thousand dollars, and the suit arises under the Constitution and laws of the United States.

IX. And your orators further show, that by reason of the matters hereinbefore set forth and the insistence of the defendant that he is entitled to hold possession and control of the said goods under authority of the said act of Congress, for the reason that the said examiners, after examination made pursuant to said statute, have declared the said teas to be inferior in the respects set forth in the said act of Congress, or some of them, to the standards fixed and selected by the Secretary of the Treasury, your orators will suffer

irreparable damage; that the insistence of the defendant of his right to stamp the invoices and papers relating to the importation of said teas, as condemned under the laws of the United States, render- the said teas worthless for export, and entry or sale in markets of other countries, and that the said claim of the defendant, that the said teas cannot be lawfully taken from the said warehouses, render- the said teas unsalable and worthless in the market, for the reason that dealers will not purchase or handle the said goods under the cloud or threat of illegality regarding the same, created by such insistence and claim on the part of the defendant.

X. Your orators further show that your orators purpose and intend to import from time to time other invoices of teas into the United States, and that the said defendant threatens and intends to seize and hold such teas, and take possession and control of the same, and refuse your orators possession of the same, in the same manner and under the same claim of authority of said act of Congress, as the said defendant has heretofore made and set up with regard to the teas hereinbefore set forth, and that your orators' right to import and deal in teas is thereby destroyed and taken away.

7 XI. Your orators further show and allege that your orators do not set up or allege as ground for denying the right of the defendant so to hold and deal with said teas, as hereinbefore set forth, any defect, omission, or irregularity in the proceedings by the examiners and appraisers with regard to said teas, but solely on the ground that the act of Congress hereinbefore referred to, approved by the President March 2, 1897, and entitled "An act to prevent the importation of impure and unwholesome tea," is unconstitutional and void, and confers no authority upon the defendant, and creates no right in the defendant to refuse to permit your orators to take possession of the said teas and introduce them into, and sell them in the, United States.

XII. Your orators further show that they have complied in all respects with the requirements of law as to the entry of said teas in the custom-house at the port of New York, and there is no further act required by law of your orators to entitle them to so take possession and dispose of the same, and that your orators are without any adequate remedy at law.

XIII. Your orators further complain and say that forasmuch as your orators can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if he can, show why your orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

XIV. And your orators further pray that a provisional or
8 preliminary injunction be issued restraining the said defendant from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to

take possession of the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words, "Condemned under the laws of the United States," or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession or authority relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress entitled "An act to prevent the importation of impure and unwholesome tea," and for such other and further relief as the equity of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orators, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said George R. Bidwell, commanding him on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

DAVENPORT & BULL,
Solicitors for Complainants and of Counsel,
30 *Broad Street, Borough of Manhattan,*
the City of New York.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

On this 7th day of February, 1898, before me personally appeared William J. Cruickshank, one of the complainants above named, who being by me duly affirmed, deposes and says: That he is one of the complainants above named; that he has read the foregoing
9 bill of complaint and knows the contents thereof, and that the same is true of his own knowledge.

WILLIAM J. CRUICKSHANK.

Affirmed and subscribed before me this 7th day of February, 1898.

A. E. HASKINS,
Notary Public, Kings Co.

Cert. filed in New York Co.

Circuit Court of the United States, Southern District of New York.

WILLIAM J. CRUIKSHANK, MONTAGUE HOPE ROWE HARRIS, Russell Bleecker, and Mark Baggalley
against
GEORGE R. BIDWELL.

COUNTY OF NEW YORK, *ss:*

William J. Cruickshank, being duly sworn, says: I am one of the complainants in the above-entitled action. I have read the bill of complaint herein and know the contents and the same are true.

Deponent further says, that the matters set out in the bill of com-

plaint in this action and the action of the collector in enforcing said act therein referred to, tends to and will destroy the complainants' right to import teas and that said right is of the value of more than ten thousand dollars.

W. J. CRUICKSHANK.

Sworn to before me this 7th day of February, 1898.

A. E. HASKINS,
Notary Public, Kings Co.

Cert. filed in New York Co.

10 Circuit Court of the United States, Southern District of New York.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE, ROWE HARRIS, Russell Bleecker, and Mary Baggalley
against
GEORGE R. BIDWELL.

You are hereby notified that upon the bill of complaint and the affidavit of William J. Cruickshank in the above-entitled action (of which copies are herewith served upon you) a motion will be made at a stated term of the circuit court of the United States, for the southern district of New York, to be held at the court-house of said court, in the post-office building, in the borough of Manhattan, in the city of New York, room 124, on the 18th day of February, 1898, at 10½ o'clock in the forenoon, or as soon thereafter as counsel can be heard, that a preliminary writ of injunction issue herein as prayed for in the bill of complaint, and for such other and further relief as may be just and proper.

Dated New York, February 7, 1898.

DAVENPORT & BULL,
Solicitors for Complainants, 30 Broad Street, Borough of Manhattan, the City of New York.

(Endorsed:) Circuit court of the U. S., southern district of New York. William J. Cruickshank *et al. vs.* George R. Bidwell. Notice of motion. Davenport & Bull, attorneys for complainants, 30 Broad St., New York city. U. S. circuit court. Filed Apr. 20, 1898. John A. Shields, clerk.

11 United States Circuit Court, Southern District of New York.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE, ROWE Harris, Russell Bleecker, and Mark Baggalley
against
GEORGE R. BIDWELL. } In Equity.

To the clerk of the U. S. circuit court, southern district of New York.

SIR: You will please enter my appearance in behalf of the defendant in the above-entitled action.

Yours, &c.,

HENRY L. BURNETT,
U. S. Attorney, S. D. N. Y.

March 7, 1898.

(Endorsed:) U. S. circuit court, southern district of New York. Wm. J. Cruickshank & *al. versus* Geo. R. Bidwell. Notice, &c. Henry L. Burnett, United States attorney, attorney for defendant. To cl'k U. S. circuit ct., S. D. N. Y. U. S. circuit court. Filed Mar. 7, 1898. John A. Shields, clerk.

12 United States Circuit Court, Southern District of New York.

WILLIAM J. CRUICKSHANK and Others
vs.
GEORGE R. BIDWELL, Collector of the Port.

Motion for preliminary injunction.

LACOMBE, *Circuit Judge:*

The act which plaintiff criticises in this case is apparently framed, as are the exclusion acts, in conformity with prevailing theories, to leave the decision of disputable questions with an administrative officer rather than with the courts. Such a system is of course open to abuse, but it is not necessarily in all cases unconstitutional. No citizen of the United States has a vested right to import teas if Congress under its power to regulate commerce prohibits their importation. And if that body chooses to admit only those teas which may be approved by such administrative officer as it selects, the legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter.

In view of the decisions of the U. S. Supreme Court in Lem Moon Sing *v.* U. S., 158 U. S., 538, and a line of similar cases, such
13 legislation seems not to be obnoxious to the objection that it is unconstitutional.

Motion denied.

(Endorsed:) Circuit court of the United States for the southern district of New York. William J. Cruickshank & o'rs *vs.* George R. Bidwell, collector of the port. Opinion. Lacombe, C. J. U. S. circuit court. Filed Mar. 30, 1898. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

WILLIAM J. CRUICKSHANK and Others
vs.
GEORGE R. BIDWELL.

Motion having come on to be heard herein before Hon. E. Henry Lacombe, justice of this court, on the 18th day of March, 1898, for a preliminary injunction restraining the above defendant, collector of the port of New York:

Now, on hearing John S. Davenport, of counsel, in support of the said motion, and Henry L. Burnett, United States attorney (Arthur M. King, assistant United States attorney, of counsel), in opposition thereto, and on the bill of complaint, the affidavit of William J.

Cruickshank, the affidavits of Isaac McGay and others, and on all the papers and proceedings herein, and due deliberation being had thereon, it is

14 Ordered, that the motion for a preliminary injunction be and the same hereby is denied.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. William J. Cruickshank and others *vs.* George R. Bidwell. Order denying motion for preliminary injunction. Henry L. Burnett, United States attorney. Filed Apr. 1, 1898.

15 Circuit Court of the United States, Southern District of New York.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, Russell Bleecker, and Mark Baggalley, Plaintiffs,
vs.
GEORGE R. BIDWELL, Defendant.

The demurrer of the above-named defendant, George R. Bidwell, collector of customs for the district of New York, to the bill of complaint of the above-named plaintiffs showeth:

I. That it appeareth by the plaintiffs' own showing by the said bill that they, the said plaintiffs, are not entitled to the relief prayed for by the bill against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

HENRY L. BURNETT,
United States Attorney and Solicitor and Counsel for the Defendant Bidwell.

16 I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

New York, March 31, 1898.

HENRY L. BURNETT,
Of Counsel for Defendant Bidwell.

STATE OF NEW YORK, *Southern District of New York, County of New York,* } ss:

George R. Bidwell, being duly sworn, deposes and says: I am the collector of customs for the district of New York, and in my official capacity am the defendant herein. The foregoing demurrer is not interposed for delay.

G. R. BIDWELL.]

Subscribed and sworn to before me this 31 day of March, 1898.
FRANCIS B. AUTZ,
Notary Public, City & County of New York.

17 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 17th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: Honorable Alfred C. Coxe, circuit judge.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, Russell Bleecker, and Mark Baggalley, Complainants,
vs.
GEORGE R. BIDWELL, Defendant.

This cause having come on to be heard upon the bill of complaint herein, and the demurrer having been filed in said cause, and having been argued by counsel for the respective parties, Messrs. Davenport & Bull appearing for complainants and Henry L. Burnett, United States attorney, and Arthur M. King, assistant United States attorney, of counsel for defendant: Now, therefore, in consideration thereof, it is—

Ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, as follows, viz: That the complainants' said bill of complaint be, and the same hereby is, dismissed with costs to the defendant, to be taxed.

(S'g'd) ALFRED C. COXE, *U. S. J.*

(Endorsed:) U. S. circuit court. Filed Nov. 21, 1898. John A. Shields, clerk.

18 Supreme Court of the United States.

WILLIAM J. CRUICKSHANK, MONTAGUE Hope Rowe Harris, Russell Bleecker, and Mark Baggalley, Appellants,
against
GEORGE R. BIDWELL, Appellee.
} Assignment of Error on Appeal.

And now, on this 21st day of February, 1899, come the appellants, William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker, and Mark Baggalley, by John S. Davenport, Esq., of Davenport & Bull, their solicitors, and say that the decree dismissing the complaint in said cause is erroneous and against the just rights of the said appellants for the following reasons:

First. That the court erred in sustaining the demurrer and in dismissing the bill of complaint.

Second. That the court erred in making its decree dismissing the appellants' bill of complaint for the reason that the act of Congress approved by the President March 2, 1897, and entitled "An act to prevent the importation of impure and unwholesome teas," by

virtue of which the appellee claims the right to hold and destroy appellants' teas, is unconstitutional and void, and confers no authority upon the appellee and creates no right in the ap-
19 pellee to refuse to permit the appellants to take possession of the teas set forth in the bill of complaint, and to introduce them into and sell them in the United States.

Third. The court erred in dismissing the appellants' bill for the reason that the said act of Congress is unconstitutional and void, as purporting to authorize the respondent to deprive appellants of their property without due process of law.

Fourth. The court erred in dismissing the appellants' bill because it is apparent on the face of the bill that the respondent is not authorized by law to do any of the acts complained of in the bill of complaint.

Fifth. That the court erred in sustaining the demurrer of the appellee and dismissing the appellants' bill for the reason that the matters and facts alleged in the bill of complaint herein constitute a good and sufficient cause of action, and it appears on the face of said bill of complaint that the defendant, appellee, is unlawfully and without right interfering with and destroying the right of the complainants, appellants, to import and introduce the said teas into the United States, and is depriving the complainants, appellants, of the right to import teas into the United States, and that it appears on the face of said bill of complaint that the complainants, appellants, will suffer irreparable injury by the action of the defendant, appellee, and have no adequate remedy at law, and are entitled to a judgment enjoining the defendant, appellee, as prayed in the bill of complaint.

20 Wherefore the said appellants pray that the said decree dismissing the complaint may be reversed.

DAVENPORT & BULL,
Solicitors for Appellants, 30 Broad Street, Borough of Manhattan, the City of New York.

(Endorsed:) Supreme Court of the United States. William J. Cruickshank *et al. vs.* George R. Bidwell. Assignment of error on appeal. Davenport & Bull, solicitors for appellants, 30 Broad street, New York city. U. S. circuit court. Filed Feb. 21, 1899. John A. Shields, clerk.

21 Circuit Court of the United States, Southern District of New York.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, Russell Bleecker, and Mark Baggalley, Complainants,
against
GEORGE R. BIDWELL, Defendant.

The above-named complainants, conceiving themselves aggrieved by the decree made on the 17th day of October, 1898, and entered on the 21st day of November, 1898, in the above-entitled cause, do

hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in an assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, February 18, 1899.

DAVENPORT & BULL,
Solicitors for Complainants, Appellants, 30 Broad Street, Borough of Manhattan, the City of New York, N. Y.

22 And now, to wit, on the 21st day of February, 1899, it is ordered that the appeal be allowed as prayed for.

E. H. LACOMBE,
U. S. Circuit Judge.

Due & timely service of a copy of the within is hereby admitted. Dated New York, February 21st, 1899.

HENRY L. BURNETT,
Attorney for Def't Bidwell.

(Endorsed:) U. S. circuit court, southern district of New York. William J. Cruickshank *et al. vs.* George R. Bidwell. Notice of appeal. Davenport & Bull, solicitors for complainants, 30 Broad street, New York city. U. S. circuit court. Filed Feb. 21, 1899. John A. Shields, clerk.

23 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, Russell Bleecker, and Mark Baggalley, Appellants,
against
GEORGE R. BIDWELL, Respondent.

Know all men by these presents that we, William J. Cruickshank and William A. Avis, both of the city, county, and State of New York, are held and firmly bound unto the above-named George R. Bidwell in the sum of two hundred and fifty dollars, to be paid to the said George R. Bidwell; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 21st day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas the above-named William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker, and Mark Baggalley have prosecuted an appeal to the Supreme Court of the United States to reverse the decree overruling the demurrer rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

24 Now, therefore, the condition of this obligation is such that if the above-named William J. Cruickshank, Montague

Hope Rowe Harris, Russell Bleecker, and Mark Baggalley shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. J. CRUICKSHANK.
WILLIAM A. AVIS.

Sealed and delivered and taken and acknowledged this 21st day of February, 1899, before me—

A. E. HASKINS,
Notary Public, Kings Co.

Cert. filed in New York Co.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

William A. Avis, being duly sworn, deposes and says that he resides in the city of New York, is a freeholder, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

WILLIAM A. AVIS.

Sworn to this 21 day of February, A. D. 1899, before me—
A. E. HASKINS,
Notary Public, Kings Co.

Cert. filed in New York Co.

(Endorsed:) Circuit court of the United States, southern district of New York. William J. Cruickshank *et al. vs.* George R.
25 Bidwell. Bond on appeal to U. S. Supreme Court. Davenport & Bull, solicitors for appellants, 30 Broad street, New York. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the respondent of the right at any time to examine the sureties under oath touching their liabilities and financial condition generally. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Feb. 21, 1899. John A. Shields, clerk.

26 UNITED STATES OF AMERICA, ss:

To George R. Bidwell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 20th of March, eighteen hundred and ninety-nine, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker, and Mark Baggalley are appellants and George R. Bidwell is appellee, to show cause, if any there be, why the decree overruling the demurrer in said notice of appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 21st day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) William J. Cruickshank *et al. vs.* George R. Bidwell. Citation on appeal. Davenport & Bull, solicitors for pl'ffs, app'l'ts, 30 Broad street, New York city. U. S. circuit court. Filed Feb. 21, 1899. John A. Shields, clerk.

Due and timely service of a copy of the within is hereby admitted. Dated New York, Feb. 21, 1899.

HENRY C. BURNETT,
Att'y for Def't Bidwell.

27 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to twenty-six (26), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker, and Mark Baggalley, appellants, against George R. Bidwell, appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled Mar. 3, 1899. J. A. S.]

[Endorsed:] United States Supreme Court. William J. Cruickshank & *al. vs.* George R. Bidwell. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No., 17,325. S. New York C. C. U. S. Term No., 740. William J. Cruickshank, Montague Hope Rowe Harris, Russell Bleecker, & Mark Baggalley, appellants, *vs.* George R. Bidwell, collector of customs for the port of New York. Filed March 17, 1899.

No. 232.

Brief of Davenport for Appellants

Filed Nov. 9. 1899.

Supreme Court of the United States,

OCTOBER TERM, 1898.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, RUSSELL BLEECKER, AND MARK BAGGALLEY, APPELLANTS,
vs.
GEORGE R. BIDWELL.

No. ~~210~~ 232

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

The Evening Post Job Printing House, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1898.

WILLIAM J. CRUICKSHANK and others, Complainants-Appellants, vs. GEORGE R. BIDWELL, Defendant-Appellee.	No. 740.

BRIEF FOR APPELLANTS.

This is an appeal from the decree of the Circuit Court of the United States for the Southern District of New York, sustaining the appellee's general demurrer to the complainants' bill in equity, and dismissing the bill.

The decree is alleged to be erroneous in refusing to hold that, the act under which the Collector claims authority being void for unconstitutionality, his acts complained of in the bill give an equity entitling the complainants to relief by injunction.

THE QUESTION.

The question raised is the constitutionality of the Act of Congress, approved March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome tea." The points of unconstitutionality claimed are:

1st. That the act in letter and intent delegates the power of Congress to regulate commerce in teas by legislation, to the Secretary of the Treasury.

2d. That it authorizes the taking of the appellants' property and the interfering with his right to import without due process of law.

THE STATUTE.

The Act is printed in full as an appendix to this brief. The portions rendering it obnoxious to the charge of unconstitutionality are, briefly, as follows:

> SEC. 1, prohibits the importation of any merchandise described as tea "inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the act."
>
> SEC. 2, provides for the appointment by the Secretary of the Treasury of a board of seven experts in teas, to serve for one year, and to be subject to removal by the Secretary, who "shall prepare and submit to him standard samples of tea."

SEC. 3, provides that the Secretary, upon the recommendation of the said Board, "*shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States, and shall deposit in the Custom House duplicate samples of such standards*" It provides also that he shall furnish duplicate samples of the standards to the importers and dealers in tea, and says, "all teas or merchandise described as tea of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof."

Sections 4, 5 and 6 provide for the comparison of samples of the import with the samples of the standards for their admission, if found by the Examiner to be equal in purity, quality and fitness for consumption to the standards, and for their exclusion if, in the opinion of the Examiner, they are found to be inferior in purity, quality and fitness for consumption to the said standards.

On the protest of either the Collector or the importer, the Examiner's decision is to be referred to a board of three United States General Appraisers, to be designated by the Secretary of the Treasury, and after due examination by them, their decision as to its equality or inferiority to the standards in the above respects shall finally admit or exclude the tea. If excluded, the importer must either give a bond to export it and forthwith export it, or the Collector must destroy it at the expiration of six months.

Section 7 providss that on the examination by the Examiner or boards of United States General Appraisers, the "purity, quality and fitness for consumption" of the same shall be tested according to the usages and customs of the tea trade, including testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Section 8 provides for the transmission by the Examiner, in the case of protest, of samples to the Board of Appraisers and for the furnishing to the importer a copy of their decision or finding. (It does not require them to state whether the tea is rejected for inferiority in all three respects, or in any single respect.) The appraisers are authorized to obtain the advice, if necessary, of persons "skilled in the examination of teas."

Section 9 provides that no condemned teas after being condemned and exported can be reimported.

Section 10 provides that the Secretary of the Treasury shall have the power to enforce the provisions of this act by proper regulations.

Section 12 repeals the prior Tea Act of 1883.

STATEMENT.

The bill of complaint is for an injunction to restrain the appellee from detaining the appellants' teas now in his possession, and from interfering with, and threatening to interfere with, future importations of teas by the appellants. The intention of the action is to save not only these teas, but com-

plainants' right of liberty to import, as in *Scott* v. *McDonald*, cited under Point 1.

The material facts alleged in the bill, and admitted by the general demurrer, are:

That the defendant is the Collector of Customs of the United States for the Port of New York, and complainants are engaged in the business of importing teas from Japan into the United States, and in November, 1897, imported into the United States and entered at the Custom House several invoices of teas: that the defendant, as Collector, holds said teas and refuses to release the same, pretending that he is authorized thereto by the provisions of the act of Congress, approved March 2, 1897, an entitled "An Act to prevent the importation of impure and unwholesome tea," because, under said act, samples of said teas have been taken by examiners appointed under the authority of the said act, compared with samples set up by the Secretary of the Treasury as standards, and found to be inferior in some or all of the respects designated in the Act of Congress either as to purity, quality or fitness for consumption; that the defendant claims the right to retain the teas for the period of six months, and thereupon to cause the same to be destroyed unless the complainants will give security to forthwith export the teas and permit the invoices and various papers relating to the teas to be marked as "teas condemned under the laws of the United States"; that the defendant's claim, that the teas cannot be lawfully taken from the warehouses, renders them

unsalable and worthless in the market by putting them under a cloud or threat of illegality; that the complainants propose and intend to import other invoices of teas, and the defendant threatens and intends to deal with them in the same manner as those he now holds; that the complainants have complied with the requirements of the law as to the entry of the teas in the Custom House, and there is no further act required by law to entitle them to take possesssion of and dispose of the same.

The bill then disclaims setting up as ground for denying the defendant's right to hold the teas any defect or omission or irregularity in the proceedings of the examiners or appraisers for the condemnation of the tea, confining its ground for equity solely to the unconstitutionality and voidness of the act of March 2, 1897.

The remedy sought is an injunction against the interference by the Collector with the teas imported and those to be imported in future.

The preliminary injunction was denied by Judge Lacombe and the demurrer was sustained by Judge Coxe, following the construction of the law as given in Judge Lacombe's opinion.

ARGUMENT.

I.

Jurisdiction of the Circuit Court.

The fact that the defendant is a United States Customs officer does not prevent the Circuit Court from taking cognizance of an action to enjoin acts

illegal because of the unconstitutionality and voidness of the statute.

Noble *v.* Union River L. R. R. Co., 147 U. S. 165.
U. S. *v.* Lee, 106 U. S., 173.
Kirwin *v.* Murphy, 49 U. S. App., 659.

> "Courts of Justice are established not only to decide upon the controverted rights of citizens as against each other, but also upon rights in controversy between them and the government."

If we cannot have this remedy we are without remedy and are deprived of due process of law. We have no remedy by mandamus to compel him to release the teas because a United States officer cannot be mandamused to do even a ministerial act, by the Circuit Courts. This is on the ground not that the Constitution throws the ægis of sovereignty over him, but simply because Congress, in the Judiciary Act, has withheld this writ from the Circuit Court (Kendall *v.* U. S., 12 Peters, 522).

Even if there were a remedy at law, as in U. S. *v.* Lee, it has been held by this Court that such remedy is not adequate for this case, and that an injunction, in analogous cases, was proper.

Scott *v.* McDonald, 165 U. S., 107.

This Court held in the last cited case that an injunction restraining the officers of the State of South Carolina from interfering with imported liquors, and

also from threatening to interfere with the importation of liquors into that State under an act void for unconstitutionality, was proper, and that there was no adequate remedy at law, saying:

> "Nor can it reasonably be claimed that the plaintiff must postpone his application to the Circuit Court as a court of equity until his property to an amount exceeding in value $2,000 has been actually seized and confiscated, when preventive remedy by injunction would be of no avail."

The only difference between this case and Scott *v.* McDonald is, that the individual to be enjoined is a United States officer.

As there is no question about the competency of United States Circuit Courts to issue injunctions in all cases, and as it may be considered settled by U. S. *v.* Lee that the sovereignty of the United States is no ground for objecting to an action against individuals claiming as United States officers, it would seem to follow that the remedy by injunction is proper and within the cognizance of the Circuit Court.

Mississippi v. *The President* (4 Wallace, 475) has no application to the present action.

The Court said of the duty, the performance of which the State of Mississippi sought to enjoin:

> "The duty thus imposed on the President is in no sense ministerial; it is purely executive and political."

The injunction sought in Mississippi *v.* The President was the restraint of a Department. The Court say:

> "Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are in proper cases subject to its cognizance."

In this case we are not seeking to restrain the Executive Department as represented by the Secretary of the Treasury. He has performed his whole duty in executing the statute, namely, in fixing standards and appointing examiners.

The reasons for refusing to entertain a bill against the President do not exist in any sense as to a bill to restrain a purely ministerial act on the part of a collector.

We now divide our argument into two parts: Delegation of legislative powers, and Right to due process of law.

PART I.

Unconstitutional delegation of legislative power.

II.

The power vested in the Secretary to establish the standards of purity, quality and fitness for consumption which shall control the exclusion or admission of all teas is strictly legislative, and therefore unconstitutional.

Field *v.* Clark, 143 U. S., 649.

The test or rule, as approved by this Court in that case, is stated as follows:

> "The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In this statute both of these classes of authority are seen in striking contrast.

In Section 3 the "Power to say what the law shall be"—by fixing standards.

In Section 10, "Discretion as to its execution"—in the following words: The Secretary of the Treasury shall have power to enforce the provisions of this act by proper regulations.

To test the act by the above rule "we ask what is the provision of the Act as to the teas to be ex-

cluded or admitted?" The only answer possible is, "Such teas only are admissible as are not inferior to standards to be fixed by the Secretary of the Treasury."

Clearly, then, no man can tell what the law is to be until there are standards and there cannot be any until the Secretary has acted. And no man can tell from day to day what it will be to-morrow, for he has unlimited power to change it by changing the standards.

THE RULE WHICH IS TO BE ORIGINATED, AND FROM TIME TO TIME PROMULGATED, BY THE SECRETARY IN HIS STANDARDS, IS THE ONLY AND THE PARAMOUNT RULE CONTEMPLATED BY THE ACT.

There is nothing in the statute to require this rule to be consistent from year to year. The law, as fixed by him in '97, may be to exclude all except teas of high standard, and, in '98, to admit all except the lowest standard. He can change the law governing any particular tea, at any time, by changing the standard. As a consequence, the character of tea lawful to be imported when shipped may be in the meantime illegal when it arrives. The power given is sufficient to enact laws which would control the supply and demand from time to time. Thus it appears he has power to enact, alter, modify and repeal from time to time in his unlimited discretion the rule which regulates commerce in teas.

If we would treat this power to fix standards as a regulation to enforce a provision of a statute, we must look to the statute for the provision to be enforced, and there is no such provision in the law.

The establishment of standards is not like the duty of the President under the reciprocity laws, the ascertainment of a fact or state of facts upon which the operation of a rule contained in the statute depends. The thing to be fixed by the standards is a policy, not a fact; that is, encouragement of trade in tea made by raising or lowering the degree of comparative purity, the degree of comparative fitness for consumption, and the quality absolutely.

III.

The plain intent of the language used in the act, as well as its actual effect, is to give the Secretary of the Treasury unrestricted power to originate, alter, repeal and re-enact the rule governing commerce in tea.

This appears from a consideration of the language of the act.

FIRST.—*The obvious and ordinary intent of the words used.*

SECOND.—*The intent of Congress as manifested by the previous legislation of which this is an emendation.*

THIRD.—*By the report of the Senate Committee upon which this bill was adopted.*

FIRST.—*The plain and obvious intent of the language used.*

The dictionary meaning of a standard is a measure or rule of quantity or quality.

The things to be measured by the standard are purity, quality and fitness for consumption. The requirement of a standard or measure implies that each of these characteristics is comparative and a matter of degree.

Purity.—It is, therefore, only reasonable to conclude that Congress used purity as applied to teas in a comparative sense.

In support of this, we take the liberty of quoting the language of the counsel for the Government in his printed brief in Buttfield *vs.* Bidwell.

"The establishment of a standard of purity and unwholesomeness implies the assumption that some degree of impurity and unwholesomeness is necessary."

The language which would exclude discretion would be to require him to select samples of *pure* teas as standards; but he is authorized to make "standards of purity." Purity, therefore, is not itself the standard exemplified by the Secretary's sample, but his standard is the exemplification of the degree of purity he sees fit to require. The word purity admits of this, for we speak of degrees of purity in water, knowing that no natural spring water is absolutely pure. The subjoined

quotations from the Report of the Senate Committee will confirm this:

Fitness for consumption: The same reasoning applies to this term also. Unless the words absolutely forbid it, we must assume that Congress knew that there were different degrees of fitness for consumption. It cannot be said that the term "fitness for consumption" does not admit of degrees. Steel rails have more fitness for consumption than iron rails. It well may be that a tea two years old is not so well fitted for consumption as one of this year's crop.

Further, the language of the statute is not that all impure and unwholesome teas only are to be excluded, but only such teas as are inferior in those and other respects to the standards fixed by the Secretary. Indeed, the law forbids the examiner or the appraisers to reverse the Secretary's discretion and admit an invoice of tea if it be strictly pure and fit for consumption, if it is inferior to the standard of the Secretary.

Quality: The word "quality" is more manifestly amenable to this reasoning than the other two.

The dictionary definitions are:

> Webster: "The condition of being of such and such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

Worcester: "The nature of a thing relatively considered; property of a thing; attribute."

The Century: Degree of excellence or fineness; grade, as, the food was of inferior quality; the finest quality of clothing."

All of which justifies fully the language of Mr. Whitney, the learned counsel for the Government, in his printed brief in the case of Buttfield *v.* Bidwell, where he says:

> "The term 'quality' is a very familiar one in the English language. It is not synonymous with wholesomeness. It does not represent hygienic qualities. It represents the attributes of an article in their widest scope. *No broader jurisdiction could be given over any article than by giving power to regulate its quality.*"

The relation of the word "quality" is shown in an official publication of the U S. Agricultural Department, 1892, on Food and Food Adulteration, part 7, page 898.

The analytical and other work in connection with this report indicates that there are few, if any, spurious teas on the market. The range *in quality* is undoubtedly very great, many samples deserving to be termed "tea" simply because they are composed of the leaves of the *Thea*, and not through the many pleasant qualities which we usually associate with the beverage of this name.

With the strict enforcement of the United States adulteration act, the consumer is reasonably well protected, so far as securing the genuine leaf is concerned, *but, of course, has no protection from the sale of inferior teas.*

This Act of 1897 is a substitute for the Act of 1883. The Act of 1883 withheld discretion, and specified positively the causes for which tea was to be excluded. The Act of 1897 eliminates that specification and substitutes instead "standards be established by the Secretary of the Treasury."

The first section of the Act of 1883 is in the same words as the first section of this act, except that in place of the words in '97 "*inferior in purity, quality, and fitness for consumption to the standards provided in section three*" the act of '83 excluded only teas "*adulterated with spurious leaf or with exhausted leaves, or which contain so great an admixture of chemicals or other deleterious substances as to make it unfit for use.*"

In 1883 the Examiner was to decide whether or not a specific invoice of tea answered the above specified description which constituted the standard. In 1897 the Examiner is to decide whether or not the tea was above or below a standard not specified in the law, but left it to the Board of Experts under the Secretary of the Treasury to specify them.

Our argument is, that the withdrawal of the rule or standard given in the Act of 1883 emphasizes the evident intent to give the Secretary of the Treasury the legislative power which Congress itself exercised in giving that standard in 1883.

Again, it further appears from the consideration that there was no necessity, unless this illegal dis-

cretion was aimed at, to pass a law to enable the Secretary of the Treasury to furnish examiners samples to aid them in ascertaining the absolute character of the tea. Both of the acts give him power to enforce their provisions by appropriate regulations, and anything not discretionary could be done under this.

Again, the Act of 1883 discloses to us what is intended by "pure" teas. It is, tea "not adulterated with any spurious leaf or with exhausted leaves."

Clearly, therefore, the reason for allowing the Secretary to fix a standard was to leave it to his discretion as to how much adulterated or spurious leaf might be introduced, and this is confirmed by the Report of the Senate Committee on Commerce.

Again, in the Act of 1883 "unfitness for use" is limited to such unfitness only as is occasioned by containing so great a "mixture of chemicals or other deleterious substances as to make it unfit for use."

This, which is clearly a hygienic standard also, is withdrawn, and the whole field of unfitness for use, both as to reasons and also as to degree, is withdrawn from the statute and committed to the Secretary's discretion.

The numerous sanitary inspection laws stand in sharp contrast with this—in that, like the Tea Law of 1883, they give a rule and do not leave the rule to an administrative officer. For example—the Food Act.

THIRD.—*The intent to give legislative discretion is shown in the report of the Senate Committee on Commerce, on which this bill was adopted.*

54th Congress, Second Session; Senate. Report No. 1527, February 23, 1897.

We cite this on authority of Amer. N. & T. C. *v.* Worthington, 141 U. S., 468).

On the question of purity as deemed for fitness for consumption, they say:

> "As many teas fit for use may have some quality of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn. Consequently some importer is always suffering injustice by having his teas rejected which are fully equal to another's whose teas are admitted."

The Act of 1883 forbade *any* adulterated or exhausted leaves. The intent of this act is to admit teas having some quantity of adulterated or exhausted leaf, and to give the Secretary power and discretion as to the degree. Clearly, comparative purity with discretion as to degree is what was contemplated by this act.

Again, as to fitness for consumption, they say:

> "The inspectors having no guide as to what constitutes tea unfit for use, were obliged to decide according to their own impressions of the moment, necessarily vague, which resulted in the shutting out of a tea to day which would be admitted to-morrow."

This again illustrates forcibly the evident intent to give the Secretary arbitrary power; for, as expert inspectors found in themselves no definite impression of unfitness for use, which would enable them to judge, the statute authorizes the Secretary of the Treasury to make his impression, whatever it might be, the law, expressing it in a standard.

Again, as to quality, the intent to give an arbitrary discretion is much more evident. They say:

> "Not only the inspectors have no guide or standard by which to judge, but the arbitrators are likewise at sea, left entirely to their own vague impressions, which are constantly varying. It is a well known fact that experts vary in their impressions of values, as proved continually by valuations at public auctions, in which the teas are never valued the same by different brokers, but frequently at 20 per cent. or 30 per cent. variation."

If the above be true, that even experts vary and are left to their impressions, what greater power could be given to the Secretary of the Treasury than to make his impression, expressed in a standard, the law?

The foregoing suggests also other questions. For example, if several experts in teas cannot agree within twenty or thirty per cent. as to their grade, how is the Secretary to establish a standard not purely discretionary and arbitrary. Or, are examiners, in comparing an import with the "standard," to

say whether it is twenty or thirty per cent. above or below it? It must be therefore governed, not by a law, but by the arbitrary authority of the samples set up as standards.

The result of this would be that not only is the Secretary of the Treasury practically left liberty to establish a standard, as to which there being no guide in the words of the law, purity, quality and fitness for consumption, he cannot be sure of the grade he dictates, and our teas are excluded when it is not practical to say within twenty or thirty per cent. whether they are above or below standard.

The report goes on to propose a remedy which Congress has emphatically not adopted. It was this: To make it the duty of the board of experts "to determine *the lowest grade of tea fit for use;* purchase enough for a standard, say five packages of each kind," and make these the standard samples. If we prove the act had given the Secretary, as the law, to be exemplified in his samples, the lowest grade fit for use, it would perhaps not be so far over the constitutional limit; but it absolutely refrains from imposing any such limitation upon him and leaves him, first, to choose whether he will take a high or a low grade, and then to get samples of it.

Thus it appears that the law has taken away the rule fixed by the Act of 1883 on the one hand, and failed to prescribe a rule of the lowest grade, or any restriction upon the grade to be selected, from

which we argue that the intent of the law is that which appears from its obvious language, to wit, to give absolute discretion, unlimited by position, wholesomeness or purity, or absolute unfitness for use, or any restriction upon high or low grade, from year to year, to say what the law is to be.

IV.

The title of the act cannot be used to extend or restrain any positive provision contained in the body of the act.

U. S. *v.* Oregon & Cal. R. R. Co., 164 U. S., 526.

Hadden *v.* the Collector, 5 Wall., 107.

> "It is only when the meaning of the act is doubtful that resort may be had to the title, and even then it has little weight."

There is no ambiguity in the act proper. The fact that the power to fix standards of purity, quality and fitness for consumption gives discretion as to degree, is not ambiguity.

The word "quality" is not in the title. It is apparent that the omission of a word from the title does not furnish ground to use the title for denying that word all force.

V.

Cases decided under this act. See Point IX.

Cruikshank v. *Bidwell.*

This is the decision of Judge Lacombe in this case, denying the motion for a preliminary injunction, following which the demurrer was sustained.

The opinion is part of the record, at page 7. It is based on the decisions of this Court upon the alien exclusion acts.

The questions decided in the alien exclusion cases have no analogy to the questions in this case.

Those acts confer nothing but a judicial function on the Secretary of the Treasury, and do not raise the question of delegation.

As to due process of law, the alien laws are laws prescribing the limitations under which, to an alien who has no right to enter, a right is to be accorded.

This act is a law authorizing the restriction of the citizen's right to liberty to import. As to both laws, the power to legislate cannot be delegated. As to the alien act, as it accords him a right and does not deny any right, the question of due process does not arise. The distinction between the statutes is more fully discussed under Point IX., denial of due process.

The learned Judge also uses the words "power to decide finally whether an alien has or has not sufficient property to enter" as if they were in the statute. The words of the statute are, "such aliens as are likely to become a public charge."

But the alien acts do not give the Secretary of the Treasury power "to decide finally *whether an alien has or has not sufficient property to be allowed to en-*

ter." The authority upon which the Secretary acts is expressed in the alien acts to be, "to exclude such aliens as are likely to become a public charge." Of course, the amount of property which an alien has would be an element in reaching the conclusion whether he was "likely to become a public charge"; but, certainly, the duty to decide whether he is "likely to become a public charge" cannot be construed to give the Secretary authority to fix a standard of the amount of property which an alien must have in order to enter.

This would be an attempt to limit the law similar to that disapproved of in

Morrill *v.* Jones, 106 U. S., 267.

An act requiring the Secretary to admit free of duty all animals imported for breeding purposes did not authorize him to make a regulation that only animals which could be called fancy stock should be admitted.

Power to arbitrarily fix the amount of property required would be legislative.

Buttfield v. *Bidwell*, U. S. Circuit Court of Appeals, Second Circuit:

The question discussed in this case was the force of the words "purity, quality, and fitness for consumption." The question of constitutionality, of course, could not be discussed, the Court of Appeals having no jurisdiction.

The plaintiff's teas had been rejected because, ad-

mitting them to be pure and fit for consumption, they were found not equal in "quality." He contended that the act could be sustained only as a health act relating to wholesomeness, and that the word "quality" was to be interpreted to mean nothing else but purity and fitness for consumption, as indicating wholesomeness. Upon which the Court say:

> "The argument for the complainant, in effect, requires the word 'quality,' whenever used in the Act of Congress, to be eliminated, or if not eliminated, to be used as a synonym for purity and fitness for consumption. The history of the enactment shows that the word was industriously inserted to make the act a more stringent substitute for the existing legislation. The amendment evinces the intention of the Senate to authorize the adoption of all uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of teas whether demonstrably of inferior degree of purity or unfit for consumption, or presumably or possibly so, because of their inferior quality."

But the act does not specify—the lowest grades—hence the power to exclude the lowest necessary imports the power to admit only the highest. It is true the "lowest" may have been in the mind of the committee, but it is not expressed in the act, and the rule is too familiar to need citation, that not what is done under a law, but the power given, is the test of its constitutionality.

Sang Lung v. *Jackson* (Circuit Court, California, 85 Fed. Rep., 502):

In this case the constitutionality of this act came in question and was upheld.

The Secretary of the Treasury had failed to fix any standards for the kinds of tea which the Collector was excluding. Hence it was impossible for the Collector to get a decision that the tea was below standard.

But it is evident that the law was not carefully considered, on the question of delegation of power, for the matter is disposed of in this way:

> "This was simply one of the means devised by Congress for carrying out its expressed will that no impure or adulterated teas should be admitted into the United States."

But, as we have seen, Congress in repealing the Act of 1883 had disclaimed that purpose and certainly does not express it in this statute.

To the complainant's objection that his teas had not been adjudged inferior to the standard, the reply is (p. 107), in effect, an importer has no more right to import than an alien to enter:

> "We do not think the complainants have any such absolute or vested right to import tea into the United States as would authorize a court of equity to inquire whether the Secretary of the Treasury in establishing standards under the act of March 2, 1897, made any

mistake *of law* or fact;" and he cites the alien exclusion cases.

But they are inapplicable, for the alien can only ask a privilege to enter, where the importer has a right to import, which can be regulated only according to "the law of the land."

VI.

Decisions on the question of delegated legislative authority.

The power to provide standards is the power to legislate.

Dowling *v.* The Ins. Co., 31 L. R. A., 112 (Wisc.)
O'Neill *v.* The Ins. Co., 166 Pa., 71.

The power held unconstitutional in these cases was power to the Commissioner of Insurance to fix a standard form of policy of insurance, and the use of any other was forbidden. The mere fact that the policy must be a policy of insurance was not held to purge the power to fix standards of its legislative character.

Adams *v.* Burdge, 95 Wisc., 390.

A statute was held unconstitutional, for delegation of legislative power, which authorized the State Board of Health to make such rules and regulations, and to take such measures as may, in its judgment, be necessary for the protection of the people of the

State from certain contagious diseases. The Board passed a rule excluding from attending school children who had not been vaccinated.

Chi., M. & St. P. R. R. Co. *v.* Minn., 134 U. S., 418.

This was delegation to a commission of power to fix rates of freight. No question of power of delegation was raised. The power was upheld on the ground of the right reserved to the legislatures to make a franchise subject to the direction of commissioners.

Importers, exercising the right of liberty to import, are not analogous to railroads acting under franchises

Further, in these cases it was held that the making of the Commissioners' decision final, was unconstitutional as delegating and infringing the function of the judiciary.

THE BRIDGE CASES.

U. S. *v.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178.
U. S. *v.* Rider, 50 Fed. Rep. 406.
U. S. *v.* City of Moline, 82 Fed. Rep., 592.

In the first two of the above cases, the courts held that the power to the Secretary of War, to condemn at discretion any railroad bridge "now con-

structed or hereafter to be constructed over navigable waterways as an obstruction to free navigation, by reason of insufficient height, width or span, *or otherwise*," was a delegation of the power to determine how much of an obstruction public interest required should be placed in the way of the free navigation of a river, and that such powers could not be delegated.

In the latter case, U. S. *v.* City of Moline, the Court held that the power to make the determination as to a particular obstruction existing over a waterway under improvement by the United States, was judicial and not legislative, and constitutional, because his decision could only be put in force by appeal to the courts, and was subject to discussion as to reasonableness.

All three decisions agree that he could not be commissioned to fix a standard for the freedom of waterways.

The Reciprocity and Embargo Laws.

Field *v.* Clark, 143 U. S., 649.

The prevailing opinion of the Court was based on the principle that the only duty the President had was to ascertain the existence of a certain state of facts, and his declaration of the same was to put a complete law in operation or to suspend it.

The Court interprets the words "he deems the

state of fact to exist" to mean "when he shall find it to be the fact."

The dissenting opinion held the words "he deems" to mean "in his discretion."

The case rests upon the decision that the facts in question certainly existed, and therefore left him no discretion.

U. S. *v.* Ormsbee, 74 Fed. Rep., 207.

The authority to the Secretary of War to prescribe rules and regulations for the use, administration and navigation of canals owned and operated by the United States as, in his judgment, public necessity may require, was held not legislative.

In this case Congress was simply regulating the use of public property, and not liable to criticism because interfering with the rights of any individual.

VII.

There is no established custom of legislation like that of statutes giving the President reciprocity and embargo powers to justify this act.

The Food Act of the United States provides for proceedings by forfeiture, and does not leave the standard to an administrative officer, but prescribes it, as did the Tea Act of 1883. Other health laws are of a like nature, and usually provide for actions for forfeiture.

VIII.

The constitutionality of the law is to be judged not by what is done, but by what the law authorizes to be done.

Colon *v.* Lisk, 153 N. Y., 188.

This law authorizes the Secretary of the Treasury to fix high or low standards as he sees fit. It cannot be said that if he fixes any other than the lowest possible standards consistent with wholesomeness he would be violating the law.

The most strained construction cannot read anything like this into the statute.

The secretary seems to be limited to such samples as the board of experts furnish him, and also by their recommendation.

The term of the board is one year. It is, of course, a matter of judicial notice that tea is an annual crop. The standards of the crop for one year might, therefore, either by accident, by intent, or by necessity, under the authority of the act, be higher or lower than the standards of the previous year. Consequently, an importer who had shipped an invoice of teas legal under the low standard of the first year, might find them illegal on arrival, under the standards fixed for the second year. This would not result from an abuse of the authority, or be an act unauthorized, but it would be the legitimate exercise of authority under the statute.

Again, assuming the standard of the second year to be lower than the standard of the first year, an importer whose teas were made illegal by the standards and were held for the six months for destruction, would find that his competitor was allowed to import exactly the same teas and have them lawful, judged by the lower standard.

PART TWO.

Unconstitutionality for denial of due process of law.

The denial of due process by this legislation is twofold:

1st. The committal of the final decision as to admission or exclusion of teas to administrative officers, without hearing allowed the importer.

2d. The denial of the right to question the legality of the standards when fixed, is denial of due process.

IX.

The constitutional power of Congress to regulate commerce is to be exercised in accordance with the other constitutional provisions as to due process of law.

> "Due process of law in each particular case means such an exertion of the powers of the Government as the settled maxims of law permit and sanction, and are under such safeguards for the protection of individual rights as those maxims prescribe for the class of

cases to which the one being dealt with belongs."

Cooley on Constitutional Limitations, 536.

We need no more precise definition than this, because all process *on the question whether our property is to be destroyed* is denied us by this statute. Our teas are seized when they enter the country, and the law gives us no hearing of any sort, but simply leaves us to the *ex parte* condemnation of an administrative officer.

The statute in question here is really to compel commerce in the better grades of tea. It is analogous to the oleomargarine act in New York, which was held to be not a police or health or inspection law, though so entitled, but a law to protect the trade in butter from the competition of a cheaper article.

People *v* Marx, 99 N. Y., 377.
Re Jacobs, 98 N. Y., 98.

We contend that denial of process in such cases is not sanctioned by any precedent in decision or legislation or any rule of necessity, police or sanitation.

The doctrine which would accord Congress power to thus deny the importer all rights would seem to be dangerous to the last degree. If it can be done on the question of the quality of teas, it can be done on the question of the quality of any import.

The cases where summary proceedings, without other process of law, are prescribed by the Leg-

islature are only cases where public safety creates a necessity.

Wynehamer *v.* People, 13 N. Y., 389.

These are—

Quarantine laws, as to men and animals:

They appeal to the rule that the public safety is the highest law.

Revenue and Tax laws:

These stand on three exceptional circumstances:

1st. That the collection of customs is vital to the existence of the Government.

2d. That the collection of customs would be impossible through judicial process.

3d. That summary process for collection of customs and debts due Governments was the law of the land and due process before the Constitution.

Murray *v.* Hoboken L. C., 59 U. S., 72.

Another class is Police Laws, such as the destruction of buildings to prevent the spread of conflagration.

This act does not come within any of these classes. It is in no sense a quarantine law, nor a revenue law, nor is there any possibility of invoking the rule that the public safety is the highest law.

That there is no necessity for the instant final decision is shown by the fact that the statute provides for detention of the tea for six months.

It cannot be contended that the law could not be

enforced if the importer were given a hearing or a day in court, for the reason that there is no haste required, and for the further reason that if there were danger that the action of the importer in demanding his day in court should be burdensome to the Government, it can be checked by affixing penalties in cases where the attempt to import is adjudicated illegal.

Hence we contend that this summary proceeding is not appropriate to the end aimed at by the law.

The custom of legislation does not furnish precedent for the extension of summary process to this case.

The food laws of the United States and similar statutes usually provide for a process to forfeit the condemned articles, or require action in court to compel the offending party to comply with the law, giving him his day in court.

THE ALIEN EXCLUSION ACT DECISIONS ARE NOT PRECEDENTS FOR APPLYING SUMMARY PROCESS, UNDER THE POWER TO REGULATE COMMERCE.

The principle upon which they stand is, that the alien seeking admission is not exercising a right, but merely asking for a privilege, and that Congress, under its power to regulate commerce, can affix as a condition to granting the privilege, that the alien appear, on examination by an administrative officer, not to belong to the classes excluded.

Ekiu *v.* U. S. (142 U. S., 651) seems to be the first case in which the question of due process as to aliens was directly discussed and decided. In prior cases the constitutionality on this point had not been questioned, but assumed.

The Court says:

> "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions and to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * *
>
> "*As to such persons*, the decisions of executive or administrative officers acting within powers expressly conferred by Congress are due process of law,"
>
> Citing Murray *v.* Hoboken Land & Imp. Co., 59 U. S., 272;
>
> Hilton *v.* Merritt, 110 U. S., 97;

these being cases of the summary powers for collection of customs.

To say that the nation has power, as essential to self preservation, to admit aliens only upon such conditions as it may see fit to prescribe, and then to say that the alien who has only a *privilege* to ask to enter and not a *right*, may demand as a right that the question of his compliance with the condition be litigated, is palpably unreasonable. It is not pretended that a citizen of the United States could

be compelled to submit the final determination of his citizenship to an immigration officer.

To make the case of the importer parallel, it would be necessary to say that he is to be allowed to import goods only on condition that he waive his right to due process of law. This would be to make the constitutional limitation upon the power of Congress to regulate commerce, to wit, that it must be, according to the constitution, a nullity.

To go further back, the doctrine would permit Congress to say, "We cannot delegate legislative power to regulate commerce to the Secretary of the Treasury, but we can pass a law that you shall not engage in commerce unless you waive your right to object to such delegation."

THE DENIAL OF THE RIGHT TO QUESTION THE LEGALITY OF THE STANDARDS WHEN FIXED, IS DENIAL OF DUE PROCESS.

Even an alien can, by *habeas corpus*, have his day in court on the question whether a treasury regulation excluding him is authorized by the statute.

In re Kornmehl, 87 Fed. Rep., 314, LACOMBE, *J.*, says:

> "This instruction" (regulation under which the alien was excluded) "seems to be wholly unwarranted by any provision of the statute, at least such examination of them as this Court has been able to give fails to disclose any phraseology which can be construed as leav-

> ing the exclusion of immigrants to the mere arbitrary discretion of the Secretary of the Treasury,"

and he reverses the decision of the Treasury Department.

In *Ekiu* v. *U. S.*, it is said:

> "An alien is doubtless entitled to a right of *habeas corpus* to ascertain whether the restraint is lawful."

Now, by the device of empowering the Secretary to fix standards, all right to question their legality is practically cut off. Assume that the law can be so strained as to be construed to admit all teas which can claim to be pure and wholesome, what ground is there for us to question in court whether the samples furnished by the Secretary speak that law or not? The law says, they are the standards, and the decision of the Examiner is not on the mere question of whether the teas are pure or wholesome, but whether they are inferior to the standards. Therefore, no Court could overrule the Secretary's standards as it might illegal regulations, because in doing so, it would have to contradict the statute and pronounce them not to be standards when the statute says they are standards.

In *Butfield v. Bidwell*, the correctness of this was practically demonstrated.

The importer attempted to say that as the Secretary had included quality in his standard, it was not a legal standard. The Court held, in effect, that the practical nature of the samples precluded the question.

Although the intent of the statute might be that the result should be the exclusion only of teas not pure and wholesome, and therefore sanitary, the power of the Secretary to select standards, without limiting the standards by a law expressed in language, prevents the comparison of the standards with a law expressed in language, and thus emancipates them from any limitation of legality.

X.

Can a statute be made to depend for its whole force upon the physical properties of a specific package of tea.

We have never heard of any precedent for so doing. A law is a rule of action. Tea is a perishable commodity, liable to be changed by the effect of the elements, and by the greater or less care in drawing samples; it is also liable to be absolutely destroyed and leave no trace of itself. It is also exposed to the danger of fraudulent substitution. Being thus perishable and changeable in its nature and being the only law, there being no expression of the statute in language by which its legality can be tested, can it be said there is a law at all?

Measures of extension, weight and cubic capacity all rest upon the laws of nature. It is always possi-

ble to say conclusively whether or not a standard pound weight weighs a pound. It is logically impossible to say whether a case of tea expresses to-day what it did yesterday, or that it will express to-morrow what it does to-day.

We do not contend that a regulation that the Secretary of the Treasury, under the power to make regulations, might not use samples for the purpose of illustrating an expressed law; only that they cannot be made the law.

An extreme illustration of the unreasonableness of attempting to make the accidents of a physical substance a law is illustratsd by supposing that icicles should be set as a measure of dimension.

The naturally variable character of the law appears when we consider that the design is to give the importer samples of the teas which the Secretary has made the law. These he has to send to China or Japan as specimens to which his manufacture, or his selection of purchases is to conform. Months must necessarily elapse before his invoice can arrive here. In the meantime, it is apparent from the perishable nature of tea that it is at least within the bounds of possibility that the standards shall have materially changed so as to speak a different rule from what they did when they were selected.

The conclusion of which is, that logically the cases of tea which the Secretary makes to be the law are no law, and that the action of the Collector in detaining or destroying the tea is without due process of law, for the reason that there is no law.

XI.

If the power to make quality a part of the standard is unconstitutional, the whole act must fall.

It has been suggested that as the bill does not state the specific grounds on which the tea was rejected, we suppose the word "quality" to be unconstitutional, and "purity and fitness for consumption" without it to be legal, and that on this supposition the bill does not raise the question of constitutionality.

In reply to this we say:

1st. The bill does raise the question by the allegation that defendant intends and threatens to enforce the acts against our future imports, and so destroy our right to import. This equity was directly recognized in *Scott vs. McDonald.*

2nd. If "quality" is a matter of legislation, then the whole statute must fall.

Warren *v.* Charleston, 2 Gray, 84.

Shaw, *C. J.*, says:

> "If the parts are so mutually connected with, and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature would not pass the residue independently, the whole law is unconstitutional."
>
> Allen *v.* Louisiana, 103 U. S., 80.

Waite, *Ch., J.*:

> "The point to be determined in all such cases is, whether the unconstitutional pro-

> visions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the Legislature, if those provisions are stricken out."

That the word "quality" is so interwoven with the words "purity and fitness for consumption," and the standards provided are not three standards, one of each of these characteristics, but a composite standard, appears from the language used by the Circuit Court of Appeals in Buttfield *v.* Bidwell:

> "The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury, which would be adequate to exclude the lowest grades of teas, whether demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality."

It is apparent that each of these characteristics bears some relation to the other, and that the intent of Congress was, that the standards should be a result selected with a regard to the effect of each upon the other.

Again, the fact that the Act of 1883 dealt with purity and fitness for consumption goes to show that Congress would not have changed the law if it were not in order to introduce quality, and would not have given the Secretary of the Treasury the discretion which the standards give him, were it not that the regulation of quality was necessary for this purpose.

IN CONCLUSION.

It is apparent that this acts giving power to the Secretary to regulate the quality of tea, was passed under the impression that it was merely a health act, though the intent of its framers was to empower a committee of merchants to have almost unlimited power over their fellow importers. The arbitrary power given to such obscure officers as examiners, to save or destroy a vast amount of goods, was given under the impression that it was nothing different from the arbitrary power necessarily committed to revenue officers to ascertain the amount of taxes to be paid, and the provisions of the Constitution have been thus unconsciously transgressed by the action of Congress. While strained constructions may be put upon the statute in the endeavor to bring it within limits which would be constitutional, it cannot be denied that the actual practical construction and administration of the act must necessarily be in violation of those principles.

To sanction it as proper legislation presents the serious question whether the principle is to be adopted that the purity, quality, and fitness for consumption, or analogous characteristics, of all merchandise imported into the United States, may be left to the control of an administrative officer who, according to the principle, may be either the Secretary of the Treasury or the Collector of the Port.

JOHN S. DAVENPORT,
Of Counsel for Appellant.

APPENDIX.

AN ACT To prevent the importation of impure and unwholesome tea.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the person so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to and from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged

upon the duty herein provided, shall he paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of allk inds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him

with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this Act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted

for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this Act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States gen-

eral appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of re-examination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples and the papers therewith to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That noi imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect.

Approved March 2, 1897.

No. 232.

Reply Brf. of Davenport & Co

Appellants

Filed Nov. 20, 1899.

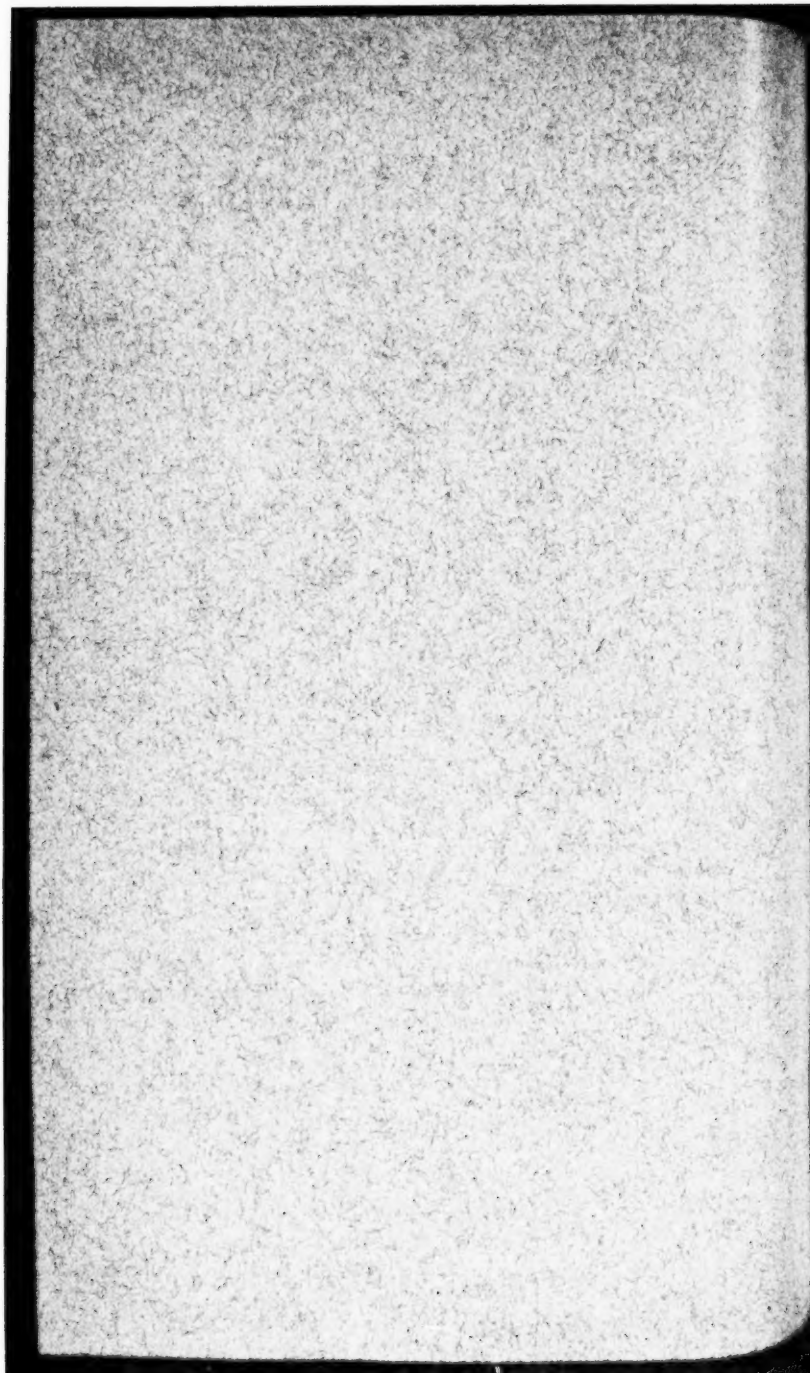
In the Supreme Court of the United States,

OCTOBER TERM, 1899.

WILLIAM J. CRUIKSHANK AND OTHERS,
Appellants,
against
GEORGE R. BIDWELL, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK,
Appellee.
} No. 232.

BRIEF FOR APPELLANTS IN REPLY TO BRIEF ON BEHALF OF WILLIAM J. BUTTFIELD AND OTHERS.

The Evening Post Job Printing House, New York.



Supreme Court of the United States.

WILLIAM J. CRUICKSHANK and others,
Appellants,

AGAINST

GEORGE R. BIDWELL,
Appellee.

APPELLANT'S BRIEF IN REPLY TO BRIEF FILED ON THE PART OF BUTTFIELD AND OTHERS.

I.

Inasmuch as the gravamen of plaintiff's complaint is the injury done to their rights and business, by the threat and intention of the defendant, admitted by the demurrer, to enforce the *whole* law as to purity, quality and fitness for consumption, against our imports in future, leaving us no remedy but a multiplicity of suits against him, the whole of the act, including the word "quality," is directly in discussion in this case, and cannot be avoided.

The fact that, as to the five different invoices which he has already seized, we do not specify that quality alone was the objection, therefore, does not apply to the allegation as to future imports, and would not justify the Court, as suggested by appellees, in refusing to consider the word "quality," even if the act could be dissected and the three words considered apart.

Appellants must concede, therefore, as they also contend, that the word "quality" is in discussion.

II.

Even if the construction of the word "quality," asked by Buttfield and others, is given to it, it will not validate the act, for the reason that the same legislative discretion as to the degree of quality remains under the absolute control of the board of experts.

It is difficult to understand Buttfield's theory of giving it some force, while giving it none at the same time. It seems to be found in the statement on page 22, "quality is only presumptive evidence of purity or fitness for consumption." Purity and fitness for consumption are themselves qualities. What the other quality is, and its degree, remains just as broad in its signification, as free in its discretion, and as impossible of defining by anything, either express or implied in the statute, as it was before.

III.

Counsel for the Government in Buttfield *v.* Bidwell, contended for the full, common sense, obvious and unquestionable force of the word. We are unable to improve upon the argument, and submit quotations as follows:

> "The word 'quality' in the Act of 1897 means something more than purity and wholesomeness."

"(*a.*) The complainant concedes that if the word "quality" be given its natural meaning, it is fully as broad as we contend. His leading affiant, Mr. Lester, states its technical meaning in the tea trade to be as follows (p. 73):

> Quality as determined by the customs and usages of the tea trade includes all the attributes of tea which affect the tea's market value, including style or appearance of dry leaf, size or brokenness of leaf, flavor, strength and body of cup or drinking quality, quality of leaf itself, which depends on its youngness, soil in which it is grown, climatic influence and season of the year in which it is picked [&c.].

"The term quality is a very familiar one in the English language. It is not synonymous with wholesomeness. It does not represent hygienic qualities. It represents the attributes of an article in their widest scope. No broader jurisdiction

could be given over any article than by giving power to regulate its quality.

Webster gives the definition as follows: "The condition of being of such and such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

Worcester says: "The nature of a thing relatively considered; property of a thing; attribute."

The Century's corresponding definition is: "Degree of excellence or fineness; grade; as, the food was of inferior quality; the finest quality of clothing."

There are many other derivative definitions in the dictionaries, but these are the definitions most closely applicable to the present case.

It being thus conceded that both the trade definition and the dictionary definitions of the word are broad enough to cover the meaning which the Treasury Department attaches to it, it follows that there is no ambiguity in the statute."

"(*b*.) Since then there is no ambiguity in the statute, and since it does not offend the moral sense or involve any injustice, oppression or absurdity, it must be interpreted in accordance with its plain meaning, which cannot be changed by any judicial rules of construction (United States *vs.* Goldenberg, 168 U. S., 95, 103). "It is not permitted to interpret what has no need of interpre-

tation" (Vattel, quoted by Chancellor Kent in Jackson *vs.* Lewis, 17 Johns., 475, 477). "It is safer to adopt what the Legislature have actually said than to suppose what they meant to say" (Jones *vs.* Smart, 1 T. R., 51, quoted in United States *vs.* Chase, 135 U. S., 255, 262). Chief Justice Marshall in Sturges *vs.* Crowninshield, 4 Wheat., 122, 202-3, lays down the rules as follows, in their application of the Constitution of the United States:"

> Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

In the Goldenberg case above cited, at pp. 102-3, Mr. Justice Brewer said:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar.

"(*c.*) Buttfield argues that the word "quality" should be construed as if it read "wholesomeness." But an article without wholesomeness is an article without fitness for consumption. Hence the word "quality" would be given no meaning in the act if complainant's construction were adopted, and this would violate one of the cardinal rules of construction, stated in Market Co. *v.* Hoffman, 101 U. S., 112, 115-6:

> It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

The application of this rule is especially striking when it is borne in mind that the statute as originally drawn contained only the words "purity and fitness for consumption," and that the word "quality" was subsequently inserted by amendment."

"(*d.*) That the word "quality" should be given its ordinary trade meaning and that it was intended to have especial reference to the test by the taste of the infusion, is shown by the context. Sec. 7 of the statute ends with the following words:"

* * *

> The purity, quality and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

"(*e.*) The word "uniform" in the statute has no bearing on the question. It is not repugnant to the existence of a separate standard for each general class of teas, any more than constitutional provisions for uniformity of taxes are repugnant to the existence of separate taxes on separate subjects of taxation. Even were wholesomeness the sole object sought by this statute, the standard for green tea would have to differ from the standard for black."

"(*f.*) The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context, and not in the title. One of the latest expressions of this familiar rule is in United States *v.* Oregon & California R. R. Co., 164 U. S., 526, 541:"

> The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. * * * The ambiguity must be in the context and not in the title to render the latter of any avail.

In Hadden *v.* The Collector, 5 Wall., 107, 110, Mr. Justice Field said:

> At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the Legislature.
>
> These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title [citing instances].

"It is quite common for the title of a statute to be narrower than the statute itself; and the reason often is (as we shall show to be the fact in the present case) that the original bill while in its progress through Congress is broadened by amendment without a corresponding amendment to the title.

Perhaps the most familiar instances in the Federal courts are in the sub-titles or headings of the tariff acts, which are so often absurdly insufficient to cover the articles therein enumerated. Thus sponges used to appear under the heading of "Chemicals, Oils or Paints," and cork under "Flax, Hemp and Jute" (21 Atty.-Gen. Opin., 67; Hollender *v.* Magone, 149 U. S., 586, 591; Seeberger *v.* Schlesinger, 152 U. S., 581, 583)."

IV.

The fact that the act attempts to require us to manufacture teas and select our importations so as to meet such rule of quality as may be prescribed under this act, demonstrates that no vague, ingenious or strained construction can be put upon a word which, when our teas arrive, is to be referred to for the question of their exclusion or destruction, and which is to be the guide of examiners and appraisers having absolutely arbitrary power, without hearing and without appeal.

V.

The filing of this intervening brief by a number of merchants demonstrates that the operation of the act, owing to its arbitrary character, is oppressive.

JOHN S. DAVENPORT,
Of Counsel for Appellants.

No. 232.

Brief of Bishop for interested parties (by leave.

Filed Nov. 10, 1899.

In the Supreme Court of the United States,

OCTOBER TERM, 1899.

WILLIAM J. CRUIKSHANK AND OTHERS,
Appellants,
against
GEORGE R. BIDWELL, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK,
Appellee.
} No. 232.

BRIEF ON BEHALF OF WILLIAM J. BUTTFIELD, T. A. SHEFFIELD & COMPANY, JOSEPH LESTER & COMPANY, WILLIAM P. ROOME AND OTHERS, INTERESTED IN THE IMPORTATION OF TEAS AT THE PORT OF NEW YORK.

The Evening Post Job Printing House, New York.

In the Supreme Court of the United States.

WILLIAM J. CRUIKSHANK and others,
Appellants,

AGAINST

GEORGE R. BIDWELL, Collector of Customs for the Port of New York,
Appellee.

Brief on behalf of William J. Buttfield, T. A. Sheffield & Company, Joseph Lester & Company, William P. Roome and others interested in the importation of teas at the port of New York.

William J. Buttfield and others have filed a petition in this Court for leave to be heard upon this appeal for the purpose of presenting to the Court what they regard as the true construction of the act entitled "An Act to prevent the importation of impure and unwholesome teas" which construction alone, as they contend, will support the constitutionality of the act.

Briefly stated the claim of these parties is that the act in question is a health law designed to prevent the importation of teas which are unwholesome, and the word "quality" as used in the act

has reference only to those qualities of tea which have relation to its wholesomeness as an article of food.

The claim has been and is made on behalf of those representing the Government that the Secretary of the Treasury is authorized by this act to establish standards of quality of teas upon the ground of grade or general excellence, irrespective of the wholesomeness of the tea or its fitness for consumption, and that all teas entitled to be imported must he equal to the standards so fixed in quality, that is in general excellence irrespective of their wholesomeness, as shown by their purity, quality or fitness for consumption.

If this construction of the statute is to be adopted we agree with the appellant that the act is unconstitutional.

If, however, the construction for which we contend be adopted, then we agree with the respondents that the act is constitutional.

We now proceed to present to the Court the considerations which seem to us to call for the construction of the act for which we contend :

I.

The construction of the act contended for by the Government and adopted in the administration of the act empowers the Secretary of the Treasury to establish standards of the general excellence or grade of teas which may be imported, and excludes from import all teas which are not equal to the standards in general excellence or grade.

(1) It has been practically conceded in the liti-

gation arising under this act that the statute is not regarded by the Government merely as a health regulation. The standards are established not merely to prevent the importation of teas which are unwholesome as an article of food, but largely to regulate the general excellence of teas brought into the country.

(2) The regulations promulgated by the Secretary of the Treasury under the authority of Section 10 of the act direct the officials to exclude teas which are not equal to the standards in "cup quality," that is in taste and flavor, although superior to the standards in the other qualifications that is in purity and fitness for consumption (Treasury Department Regulations, p. 35).

The same regulations direct the officials to reject teas which are otherwise equal to the standards in every particular, provided the particles of tea are of a size not sufficient to pass through a prescribed screen (Regulations, p. 35). This Court takes judicial notice of these regulations (Caha *v.* U. S., 152, U. S., 211, 221.)

(3) The counsel for the Government in this and other cases have contended that the insertion of the word "quality" into this act gives and was intended to give power to exclude teas, although not demonstrably or, in fact, impure or unwholesome. Mr. Whitney, of special counsel for the Government, contended in the case of Buttfield *v.* Bidwell, as follows:

> "The term quality is a very familiar one in "the English language. It is not synonymous "with wholesomeness. It does not represent "hygienic qualities. It represents attributes "of an article in their widest scope. No "broader jurisdiction could be given over any "article than by giving power to regulate its "quality.

It was urged that this extended signification of

the word quality included the authority to exclude the "lowest grades of tea," although not demonstrably or even in fact impure or unwholesome. This may be conceded. But such extended signification also includes the power to exclude any and every kind of tea. The act does not in terms prohibit the importation of the "lowest grades of tea." It does not either expressly or by implication confine exclusion to the "lowest grade of tea," unless the implication is found in the purpose of the act or the relation of the word "quality" to its associate words "purity and fitness for consumption." But if by implication the word "quality" is thus limited, then manifestly it does not as used in this act represent the attributes of tea in their widest scope. Then as used in the act it is a word of limited signification and the limitation is found in the purpose and language of the enactment. Neither of these indicate any other qualification of the word quality except wholesomeness. Hence the Secretary of the Treasury is authorized to establish standards upon the attributes of tea in their widest scope or he is limited to the establishment of standards of wholesomeness only. And the circumstance that under the former construction he may exclude teas of the lowest grade is of no significance since he may also upon that construction exclude teas upon an indefinite number of other and unallied grounds.

II.

The construction of the statute contended for by the Government renders it unconstitutional and void.

(1) If the word "quality" refers to the general excellence of the tea, then the statute establishes

no rule for the exclusion of teas, but confers upon the Secretary of the Treasury the authority to establish the rule. He may fix the standard of quality by the market value, by the size of the leaf, by the flavor, by the strength, or by each and every attribute of the tea separately, or by all of them combined. He may exclude all teas except the most costly or the most delicate, or he may permit the introduction of every shade and variety of tea. The subject is thus turned over to him in its entirety for legislative action.

(2) Congress could not confer upon the Secretary of the Treasury the authority to enact a rule of action. That is the essence of legislation.

The authority to regulate commerce is conferred by the Constitution upon Congress and not upon the Secretary of the Treasury. Congress, therefore, could not confer upon the Secretary of the Treasury authority to regulate commerce. It can only authorize him to administer such rules of law upon the subject as Congress may prescribe.

It follows that Congress did not, because it could not, confer upon the Secretary of the Treasury the power to declare what tea should be imported into the United States. Congress could and did confer upon the Secretary the administrative power to ascertain what particular teas fall within the prohibition of the statute. There must, then, be a prohibition in the statute which is definite or which is capable of application. Such a prohibition can be found only by giving to the word "quality" a limited signification. Otherwise the statute confers upon the Secretary of the Treasury the authority to determine what kind of teas may be imported. The distinction between the authority to declare what the law shall be and an authority to execute the law, even with a wide range of discretion, is clear. It has been frequently recognized and is regarded as essential, under our constitutional form of government.

In Field *vs.* Clark, 143 U. S., 649, 692, 694, speaking of the line of distinction between legislative power and executive action Mr. Justice HARLAN quoting the opinion in R. R. Co. *vs.* Commissioners, 1 Ohio State, 88, said: "The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

So in Miller *vs.* Mayor, 109 U. S., 385, the Court said:

"The efficacy of the act as to the declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingencies upon which the act shall take effect may be left to such agencies as it may designate."

Thus Congress cannot confer upon the Secretary of War the power to determine when and where a bridge shall be built over the navigable rivers of the country (U. S. *vs.* Keokuk & Bridge Co., 45 Fed. Rep., 178). Though Congress may authorize a bridge in accordance with plans to be adopted by the Secretary of War (Miller *vs.* The Mayor, 109 U. S., 385). In the case last cited the Court said: "By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact." It is unnecessary to examine the reported cases further.

If the statute directs the Secretary to establish standards of *quality* in the sense claimed by the defendants, in what respect is the will of the Legislature in any degree operative?

Nothing can be plainer than that, if the Secre-

tary of the Treasury has unlimited discretion to establish the qualities of teas which may be imported into the United States, he may determine what teas may be received without any limitation or restraint. This in effect turns the entire subject over to the Secretary of the Treasury, and leaves his will paramount and controlling. Such a construction of the statute defeats it.

The authorities on the constitutional question under the construction claimed by the government are referred to in the brief for appellant and need not be repeated. We concur in the position taken by the appellant upon that construction, but we insist that a construction is possible which will sustain the act and that such construction should be adopted.

IV.

The Court should adopt a construction of the act, if possible, which will sustain it as a constitutional and beneficial enactment.

If possible a construction should be given to the act which will render it free from constitutional objection, and if such construction can be found without doing violence to the fair meaning of the words, the Court will adopt it.

Grenada Co. *v.* Brogden, 112 U. S., 561, 269.

Marshall *v.* Grimes, 41 Miss., 27, 31.

V.

The act is a health regulation. The Secretary of the Treasury is empowered to establish uniform standards of teas which are wholesome as food, and the words "purity, quality and fitness for consumption" are all to be regarded as relative to the wholesomeness of the tea as food. In the adminstration of the act officials are to reject teas which are not equal to the standards in "purity, quality and fitness consumption" relatively to the wholesomeness of the tea as food, and not otherwise.

We shall consider *first* the purpose of the act as shown by the history of legislation leading up to and including this enactment, and *secondly* the proper construction as derived from the title and language of the act.

FIRST.—The purpose of the act as shown by the history of legislation.

(1) *Previous legislation upon kindred subjects.*

The first statute of the United States relating to the purity of imported articles is that concerning drugs and medicines (Act of June 26th, 1848, R. S. U. S., Sec 2933).

It provides that all drugs offered for import shall be examined in reference to "their quality, purity and fitness for medical purposes," and if, on examination, they are found to be inferior in strength and purity to the standards established by the United States, Edinburgh, London, French and German Pharmacopœias and Dispensatories" and

thereby improper, unsafe or "dangerous to be used for medical purposes" they are to be rejected. The Pharmacopœia and Dispensatories referred to are well-known national works, some of which are given the force of law in their respective countries. The American Pharmacopœia is the product of a national convention of medical societies held every ten years. These authorities are made the standards of the requisite strength and purity of imported drugs (Sec. 2936).

An examination of this act shows that its sole purpose was to regulate the importation of drugs so as to keep out such as are "improper, unsafe "or dangerous to be used for medicinal purposes." It was no part of its purpose to increase the market value of drugs or to restrict their importation upon any other ground than protection to public health and safety, and the word "quality" as used in that act is unquestionably used with that restricted signification.

In 1881 an act was passed in New York entitled "An Act to prevent the adulteration of food or drugs" (Laws of 1891, Chapter 407), in which the word "quality" is used.

This act embraced all articles of food or drink including teas (Laws of 1885, Ch. 176).

A similar statute in almost identical words was passed in Massachusetts in 1882 Laws of 1882, Ch. 263).

Similar statutes have been enacted in other States.

Statutes of the same general character have been enacted from time to time by Congress.

In 1884 an act was passed to prevent the exportation of diseased cattle, and to provide means for the suppression of pleuro-pneumonia and other contagious diseases among domestic animals (25 St. at L., 31).

In 1890 an act was passed to provide for the inspection of meats for exportation, and prohibiting the importation of adulterated articles of food and drink (26 St. at L., 414). The language of Sec. 2 is

as follows: "It shall be unlawful to import into the United States any adulterated or unwholesome food or drug or other spirituous or malted liquors adulterated or mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health."

In 1891 an act was passed to provide for the inspection of live cattle and other animals which are the subject of interstate commerce which provides for the examination of carcasses and products and prevents the interstate transportation of such as shall not be found to be "free of disease, wholesome, sound and fit for human food."

Without multiplying instances of such legislation attention is called to two features found in every statute we have examined upon this subject.

1st. The restraint is always upon the importation of or traffic in an article because injurious to health or unfit for consumption.

2d. The statute fixes the rule of exclusion, and the rule is always the purity or wholesomeness of the article, and wherever the word "quality" is used it is used with reference to the purity or fitness of the article for consumption.

If in the tea legislation Congress has attempted to prevent the importation of teas upon the ground of their general excellence as shown by their taste and flavor irrespective of their purity and wholesomeness, then this legislation is a singular exception in legislation of this class.

(2) *The previous legislation upon this subject:*

The importation of teas was first regulated in England in 1875 by the passage of the act known as "The Sale of Food and Drugs Act." It provided for an inspection and an analysis of teas offered for import, and directed that if such teas were found "to be mixed with other substances or exhausted leaf" they shall not be delivered to the importer; but if, on inspection and analysis,

it shall appear that such tea is in the opinion of the analyst unfit for human food, the same shall be forfeited and destroyed.

The first act in this country was that entitled "An Act to prevent the importation of adulterated and spurious teas," approved March 2d, 1883. It rendered it unlawful for any person to import any merchandise for sale as tea "adulterated with spurious leaf, or with exhausted leaves, or which contained so GREAT an admixture of chemicals or other deleterious substances as to make it unfit for use," and prohibited the importation of such merchandise. If the tea examiner rejected the teas a re-examination was to be had before a committee of three experts—one to be appointed by the collector, one by the importer and the two to choose a third.

The system so established was manifestly liable to great abuse. It permitted the tea examiner to determine in each instance whether the tea offered contained, in his opinion, *so great* an admixture of deletorious substances as to make it unfit for use. The degree of impurity permissible might vary with different importations, or even in the same importation. The importer was thus without any guide in making his purchases, and the public was without certainty of protection against an article unfit for use.

The principal evil in the operation of the law was its unfairness to importers, who were unable to regulate their purchases abroad with safety.

(3) *The Act of 1897.*

The subject came before Congress in 1897, and a report was made by the Senate Committee on commerce, which is greatly relied upon by the Government as indicating that the act as finally passed was intended to confer upon the Secretary of the Treasury the power to establish standards of tea solely upon the basis of excellence or grade without regard to wholesomeness. It is true that the

word "quality" was introduced into the act between the words "purity and fitness for consumption" by an amendment to the bill in the Senate, and that the report of the Senate Committee shows that it was the intention of the act to provide for the establishment of standards "of the lowest grades of tea fit for use."

In referring to this legislation the Circuit Court of Appeals in Buttfield *v.* Bidwell made use of the following language:

> "As originally introduced in the House the "bill prohibited the importation of 'any mer- "chandise as teas which is inferior in purity "or fitness for consumption to the standards "provided in Section 3 of this act.' It was "amended in the Senate by inserting the word "'quality' between the words 'purity and fit- "ness for consumption' wherever they occurred "in the House bill. The amendment evinces the "intention of the Senate to authorize the adop- "tion of uniform standards by the Secretary "of the Treasury which would be adequate to "exclude the lowest grades of tea whether de- "monstrably of inferior purity or unfit for "consumption or presumably or possibly so "because of their inferior quality."

But the act does not contain the words "lowest grades of tea fit for use," and if the intention to exclude only the lowest grades of tea fit for use is expressed in the act it must be because the words "purity, quality and fitness for consumption" carry that meaning. Then the rule enacted by Congress was that teas were to be excluded which were unfit for use. The unfitness, however, is for use as food not arbitrarily but relatively to the wholesomeness as food.

What teas did Congress intend to exclude? Was it teas to be selected by the Secretary of the Treasury according to a rule or grade which he was to determine, or was it teas which were prescribed by a rule laid down by Congress? If the latter what was the rule laid down by Congress? Was it not

the wholesomeness of the tea—its fitness for use as food? It is impossible to find any other rule expressed in this statute. If this is not the rule then Congress conferred upon the Secretary of the Treasury the sole authority to establish the rule of exclusion, and the act is unconstitutional.

(4) *The object of the act of 1897 was to establish fixed standards of wholesomeness in place of the variable judgment of the inspector and tea experts under the former act.*

The purpose of the new legislation was not to change the classification of teas which were to be rejected, but to define the existing classification by fixed standards. The evil to be remedied was the want of such standards. The foremost feature of the new act was the establishment of such standards. The establishment of uniform standards was intended upon the one hand to obviate the injustice to the importer arising from uncertainty as to the admission of teas which he had purchased abroad, and on the other hand the protection of the consumer by the greater certainty that teas which were injurious and prejudicial to health should not be admitted.

The construction of the statute adopted by the Government is such as to render it a constant menace and peril to legitimate business in the importation of teas. A commission recently appointed by the Secretary of the Treasury to investigate the working of this statute in the city of New York has reported that under the operation of the Tea Act, which requires tests as to "purity, quality and fitness for consumption," teas which are of low grade, but are pure and wholesome, have been refused admission solely because they do not equal the standard in point of cup quality, strength and flavor. The commission reports that it is impossible to obtain uniformity of decisions as to the relative strength and flavor of tea, because determinations

upon those points differ widely with individual preferences.

That this is the result of the administration of the act is apparent from the official figures respecting the importation of teas. These figures show that the percentage of rejections for the years 1897–1898 at New York is more than four times greater than at Chicago, while in certain low grades of teas known as Pingsueys 16 per cent. of the total imports at New York have been rejected, while out of 22,582 packages imported at San Francisco none had been rejected. These facts are found in public Government records of which this Court will take judicial notice.

Kirby *v.* Lewis, 39 Fed, R., 66.
Gregg *v.* Fosyth, 24 How, 179.
Walker *v.* Holman, 16 Pet., 56.
Bryan *v.* Fosyth, 19 How, 338.

(5) *There was no occasion for legislation prohibiting the importation of teas merely upon the ground of their inferiority in taste or flavor, if not unwholesome or unfit for consumption.*

The consumption of tea as a beverage has never been regarded as injurious to public morals, nor can it be claimed that the finer and more costly grades of tea are less injurious to health than the coarser and cheaper grades. No such distinction has been or can be made. As a measure affecting public health and public morals there was no occasion, therefore, for the exclusion of any particular class of teas unless they were either unwholesome or fraudulent.

Nor can it be presumed that Congress intended to enact a law which was merely sumptuary. Federal legislation of that class has never been attempted It would be ridiculous and unreasonable to suppose that Congress intended by this legislation to permit the Secretary of the Treasury to determine the grade of tea which the American people were to be permitted to drink. Such an in-

tent would be as ridiculous as it would be for Congress seriously to attempt to establish the cost of the wine or the delicacy of the perfumes or the fineness of the silks which should be allowed to come into the country.

(6) If a radical change in the character of the legislature upon this subject was intended it is to be assumed that Congress would have expressed itself with definiteness and certainty.

The exclusion of teas unless equal to certain standards of excellence in taste and flavor would be the substitution of a measure or standard more difficult of application that the rule of exclusion under the former statute. To prevent it from working a hardship to the importer the gradation of importable teas would need to be fixed upon commercial lines with precision. It is impossible to believe that Congress intended to set up a system of the enforced rejection of teas upon lines of grade or excellence under the indefinite language employed in this statute.

SECOND.—The proper construction of the act as derived from its title and language.

(1) *The rule of construction applicable is that general words capable of an extended or of a limited signification should be given a signification in harmony with the purpose of the legislation.*

This rule of construction has been frequently stated and enforced.

Thus in U. S. *v.* Kirby, 7 Wall., 432, it is said:

"General Terms should be so limited in their "application as not to lead to injustice, oppres- "sion, or an absurd consequence. It will always, "therefore, be presumed that the Legislature in- "tended exceptions to its language which would "avoid results of this character. The reason of

" the law in such cases should prevail over the " letter."

So in U. S. *v.* Fisher, 2 Cranch, 399:

" Whenever the intention of the makers of a " statute can be discovered it ought to be followed " with reason and discretion in the construction of " the statute, although such construction seems " contrary to the letter of the statute. A thing " which is within the letter of a statute is not " within the statute, unless it be within the inten- " tion of the makers."

So in Brewer *vs.* Blonger, 14 Pet., 178:

" It is undoubtedly true it is the duty of the " Court to ascertain the meaning of the Legislature " from the words used in the statute, and the sub- " ject matter to which it relates, and to restrain " its operation within narrower limits than its " words import if the Court are satisfied that the " literal meaning of its words extend to cases which " the Legislature never designed to include in it."

Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion.

Lau Ow Bew *v.* U. S., 144 U. S., 47, 59.
Church, &c., *v.* U. S., 143 U. S., 457.
Henderson *v.* Mayor, 92 U. S., 259.
U. S. *v.* Kirby, 7 Wall., 482.
Oatis *v.* Nat. Bank, 100 U. S., 239.

Two recent illustrations of the application of the rule in the Supreme Court may be referred to. In the case of Rev. Dr. Warren (Church of Holy Trinity *v.* U. S., 143 U. S., 457), it was claimed that the employment of Dr. Warren was within the prohibition of the Alien Contract Labor Law. The words of the act render it unlawful for any person to procure the migration of an alien into the United

States under contract "to perform labor or services of any kind in the United States." An examination into the purpose of the legislation led the Court to the conclusion that the labor of a clergyman, although within the express language of the statute, was not within its true meaning and intent.

In the case of Lau Ow Bew *v.* U. S., 144 U. S., 47, it appeared that Lau Ow Bew was a Chinese merchant, who had been domiciled in this country for a number of years. He returned to China, and subsequently sought to come into the United States, but was prohibited by the Collector of Customs at San Francisco, on the ground that he had neglected to produce the certificate mentioned in Section Six of the Chinese Restriction Act of May 6, 1892, as amended July 5, 1894.

The section referred to declares that "every "Chinese person other than a laborer who may be "entitled by said treaty or this Act to come within "the United States shall obtain the permission of "and be identified as so entitled by the Chinese "Government or such other foreign government of "which at the time such Chineseperson shall be a "subject," the permission and identification in such case to be evidenced by the certificate described. It was held that the words "about to come to the United States" must be read as meaning about to come to the United States for the first time.

The principles thus stated and applied require that the word "quality," since it is a word of abstract and relative meaning, should be given an interpretation in harmony with the purpose of the legislation.

(2) *The word "quality" is a relative and abstract word capable of a great variety of meanings dependent upon its relations to a particular subject.*

It is evident that "quality" may be used in the broad sense of general excellence, or it may be

used in a limited sense, referring to a particular attribute of a subject. We may speak of the quality of a tea, meaning its general excellence in taste or smell, or we may speak of a quality of tea having regard to its purity, wholesomeness and fitness for consumption. Whether we use the word quality in the one sense or in the other must be gathered from the connection in which the word is used.

(3) *The word "quality," therefore, under the rule of construction applicable, must be limited to the specific purpose of the act.*

If the word "quality" is capable of two or more different constructions, then that construction should be adopted which is consistent with the purpose of the act, and which is reasonable in its practical operations and just in its application. This is what we understand to be meant by the rule of construction referred to above.

(4) *The rule that each word in the statute is to be given a meaning is not violated by giving to the relative word "quality" a qualified meaning.*

It is urged by the defendants that the construction for which we contend practically obliterates the word "quality" from the statute, and that it must be assumed that the word "quality" was intended to add something to the other words employed—to wit, purity and fitness—for consumption. This rule, like every rule of construction, is to be used as a help in arriving at the intent of the Legislature. Here a general word was used which, taken in connection with the title and the manifest purpose of the legislation, was designed to give the Secretary of the Treasury the authority to fix and establish standards of wholesomeness, so that the teas should not only be of a fixed standard of purity and of a fixed standard of fitness for consumption, but also of a fixed standard of a general quality of wholesomeness having regard to its

healthfulness as a beverage. This places a needful limitation upon the authority to be exercised by the Secretary of the Treasury within which he may exercise a discretion, but beyond which he cannot go, and beyond which there is no necessity that he should go.

(5) Where a word has a variety of possible meanings, that meaning should be adopted which is reasonable, least restrictive of legitimate trade and least restrictive of common right and individual liberty.

The statute is highly penal. It works a forfeiture of property and imposes restrictions on trade. It should be construed strictly and its general terms should be restrained within the legitimate purpose to be served (Van Volkenburg *vs.* Terrey, 7 Col., 255; Smith on Construction, p. 854). No man should be deprived of his property in the summary manner provided in this statute, unless his act is brought within the plain meaning of the language employed.

Even if the construction of the statute contended for by defendants were not oppressive upon the importer, it would still be a harsh and unjust rule in its application to the consumer. It would exclude inferior grades of tea, although entirely genuine and wholesome, and would compel the poorer classes es of citizens to purchase higher grades of tea, presumably more costly and possibly less to their liking. To that extent it would interfere with the natural liberty of the citizen and the choice of commodities, which it is the general policy of the law to extend rather than to restrict.

(6) *The proper construction of the word "quality" may be ascertained by reference to the title of the act.*

Since the word "quality" has an abstract and relative meaning, we may properly refer to the

title for its true construction in this special legislation.

U. S. *v.* Fischer, 2 Cranch., 358, 386.
Coosaw Mining Co. *v.* So. Carolina, 144, U. S., 550, 563.
Church of Holy Trinity *v.* U. S., 143; U. S., 457.

(7) *The word quality is to be construed in connection with the accompanying words "purity" and "fitness for consumption."*

It is a fundamental principle in the construction of statutes that the meaning of a word may be ascertained by reference to the meaning of other words with which it is associated. The rule is embodied in the familiar maxim *noscitur a sociis.*

Arthur *v.* Moller, U. S., 365.
Aikin *v.* Wasson, 24 N. Y., 482.

The word "quality" therefore should be given a meaning corresponding with the words "purity" and "fitness for consumption," as indicating the quality of the tea in relation to its wholesomeness as an article of food.

(8) *Quality must be given a sense to which uniform standards can be practically applied.*

The Secretary of the Treasury is required to fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported. If quality means the strength and character of the tea, as indicated by taste and flavor, meaning thereby its general excellence as a beverage, no uniform standard of all kinds of teas is possible.

IV.

Upon the construction of the statute as claimed by these intervening parties it is constitutional and valid.

It is urged with great force by the appellants that the words "purity," "quality" and "fitness for consumption" are each used in the act in a comparative sense: that Congress did not enact that impure teas should not be imported or that teas of any specified quality or of any specific degree of unfitness for consumption should be excluded, but that it did confer upon the Secretary of the Treasury the power to determine what degree of impurity, what special qualities and what peculiarities of unfitness for consumption should suffice to place an embargo on importation, and that hence no rule of action was prescribed by Congress, but the subject was turned over at large to the Secretary for legislation. This position, if sustained, is fatal to the validity of the enactment. The only answer to it is one which is fatal to the construction contended for by the Government. The answer which should be made to it we think is as follows: The Act is a health regulatiou; it was designed to prevent the importation of unwholesome teas; the standards which the Secretary of the Treasury was directed to establish of "purity, quality and fitness for consumption" were in each of these particulars limited and defined by the purpose of the legislation. The Secretary was to ascertain as a fact what degree of impurity in tea was consistent with wholesomeness, what qualities in other attributes of tea were in like manner consistent with wholesomeness, and what teas were fit for consumption by reason of their wholesomeness. Here was, doubtless, a wide range of investigation and discrimination intrusted to the Secretary, but it centered in the ascertainment of a fact, to wit, the

wholesomeness of the tea as a food, and having, by the aid of the board of experts, fixed the fact the standards became like the regulations a mere mode of putting into operation the rule of law enacted by Congress to take effect upon the ascertainment of the fact. We submit that upon this construction of the Statute and upon this construction only can the act be declared constitutional.

In Conclusion.

The parties presenting this brief are desirous of obtaining a judicial construction of the statute which will enable them to conduct their business intelligently within the law. In the opinion of the United States Circuit Court of Appeals in the Bidwell case, the statute is construed only indirectly. It is said that the intention of the Senate by the amendment of the statute was as quoted above, "to "authorize the adoption of uniform standards by "the Secretary of the Treasury which would be ade- "quate to exclude the lowest grades of tea whether "demonstrably of inferior purity or unfit for con- "sumption *or presumably or possibly so because* "*of their inferior quality.*" The Court does not explain how this intention of the Senate amendment was embodied in the act as passed. Concededly, teas which are demonstrably of inferior purity or fitness for consumption are to be excluded by the standards and are to be excluded in administration because not equal to the standards, but what is meant by the words "or presumably or possibly so be- "cause of their inferior quality." The word "so," of course, refers to the inferior purity or unfitness for consumption, hence the words will read, "or "presumably or possibly of inferior purity or unfit "for consumption, because of their inferior qual- "ity." The quality then is only presumptive evidence of purity or unfitness for consumption. Then it comes to this that teas are to be rejected which are

demonstrably impure and unfit for consumption or presumably so by reason of their quality. The word "quality" then has reference to the associated words "purity and fitness for consumption." The Secretary of the Treasury is not authorized to establish standards upon the ground of general excellence or upon any other ground, except the wholesomeness of the tea, and while he may regard inferior quality as affording a presumption as to the wholesomeness of the tea, it is still nothing but evidence and evidence bearing upon the crucial question of wholesomeness.

The tea trade are entitled to know whether this is the meaning of the statute, if it is they are entitled to hold the Secretary of the Treasury up to that meaning of the statute by whatsoever methods are available to them. They assume that if this Court shall finally construe the statute as they contend, it should be construed, that the Secretary of the Treasury will conform his standards to such construction.

JAMES L. BISHOP,
For William J. Buttfield and others.

No. 232.

Br. of Atty. Gen. (Whitney, Relator)

for Collector

Filed Oct. 28, 1899

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIAM J. CRUICKSHANK ET AL., complainants,
v.
GEORGE R. BIDWELL, COLLECTOR OF customs for the port of New York.
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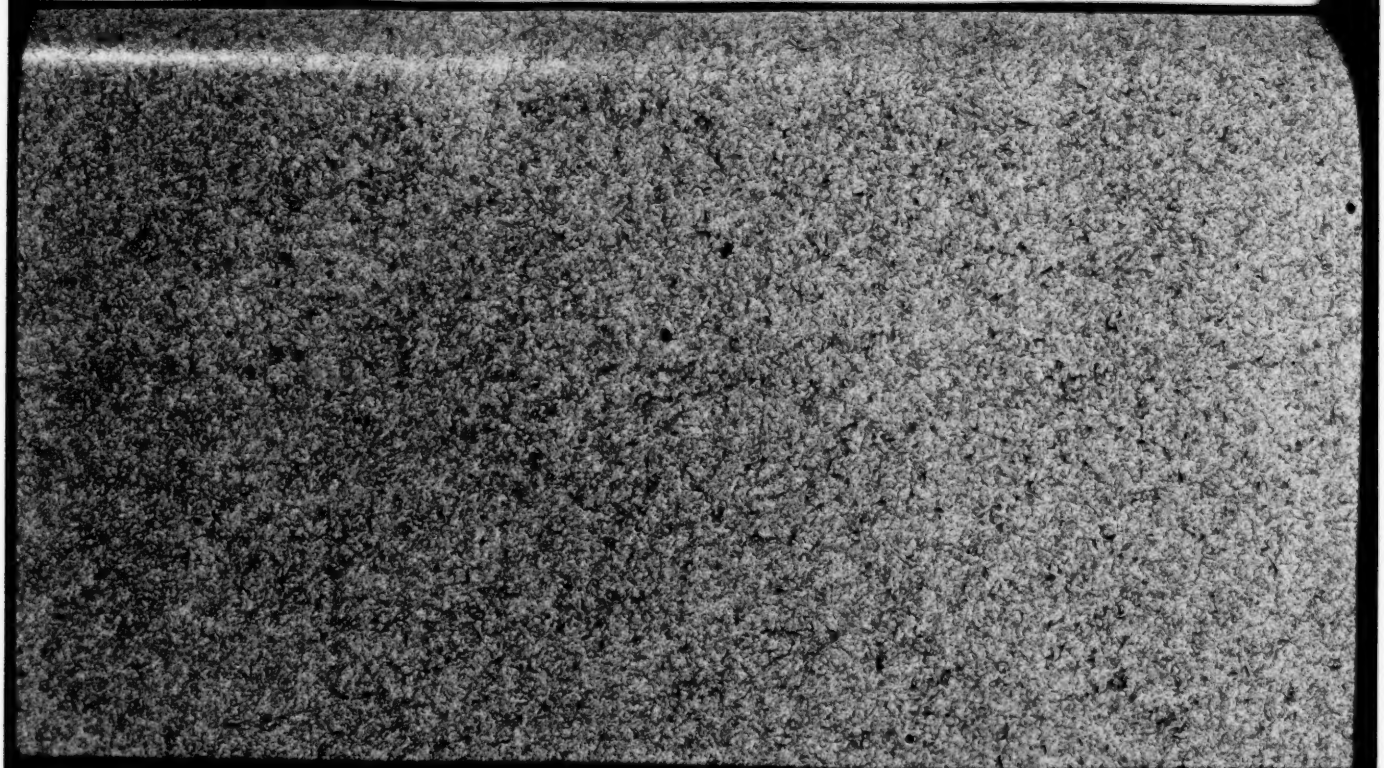
APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.



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BRIEF FOR APPELLEE.

This is an appeal from a decree of the circuit court (Lacombe, J.) dismissing a bill in equity upon demurrer. The bill draws in question the constitutionality of a law of the United States, so that the appeal was taken direct to this court. The opinion below is reported at 86 Fed. Rep., 7. The constitutionality of the act had been previously sustained by DeHaven, J., in the northern district of California, in *Sang Lung* v. *Jackson* (86 Fed. Rep., 502). The construction of the act has also been

discussed by Lacombe, J., in *Buttfield* v. *Bidwell* (94 Fed. Rep., 126), and by the circuit court of appeals on appeal in the same case in a *per curiam* opinion (Mr. Justice Peckham and Wallace and Shipman, JJ.) reported at 96 Fed. Rep., 328.

STATEMENT OF FACTS.

The demurrer admits the following to be the facts in the case:

Complainants are importers of teas from Japan. They imported the teas in question in November, 1897—in all, 76,869 pounds, the five invoices being worth altogether something over $4,000 (pp. 2, 3).

These teas are held by the defendant, claiming to act in his official capacity as collector of customs for the port of New York, and under authority of the act of Congress approved March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea." Under this act certain standard samples of teas have been selected by the Secretary of the Treasury. Samples taken from complainants' invoices were compared with the standards by the examiner appointed under the act of 1897, and were found "inferior in some or all of the respects designated in said act of Congress, either as to purity, quality, or fitness for consumption" (pp. 1, 2). Defendant claims the right to retain these teas for six months, and then cause them to be destroyed; and demands security from the complainants that they will forthwith reexport the teas, and will submit the invoices and various papers relating to the teas to be

marked by the defendant as "teas condemned under the laws of the United States."

It is not denied by the bill that the teas are, as claimed by the collector, inferior to the standard. In fact, this is conceded by the complainants' failure to appeal from the examiner's decision.

The bill alleges "irreparable damage," but shows that the damage is measurable in money, it appearing that the teas are of known value. It appears by the bill that the teas will be a total loss, whether they are left to the collector to be destroyed or withdrawn for reexport.

The bill further alleges that complainants intend to import other invoices of teas, and that defendant threatens and intends to seize them, etc., and that complainants' "right to import and deal in teas is thereby destroyed and taken away" (p. 4); but it fails to allege that complainants intend to import impure or unwholesome teas, or to show how their right to import and deal in teas is taken away if they import only pure and wholesome articles of decent quality.

No foundation thus appears for the general allegation that "complainants are without any adequate remedy at law," and they do not claim that they would be involved in any multiplicity of suits. There is only one collector of the port of New York to which port complainants' business appears to be confined (p. 1).

The bill is based solely on the theory that the act of 1897 is unconstitutional. It prays for an injunction "restraining the said defendant from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to take possession of

the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words 'Condemned under the laws of the United States,' or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession, or authority relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress entitled 'An act to prevent the importation of impure and unwholesome tea,'" and for general relief (pp. 4–5).

THE ACT OF 1897.

The title of this act, as above stated, is "An act to prevent the importation of impure and unwholesome tea."

Section 1 makes it unlawful—

> To import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption, to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

Section 2 provides for the appointment, by the Secretary of the Treasury, immediately after the passage of the act, and on or before February 15 of each subsequent year, of a board of tea experts, consisting of seven members, "who shall prepare and submit to him standard samples of tea."

Section 3 provides that "The Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported

into the United States." Samples of these standards are to be deposited in various custom-houses, and supplied to importers and dealers at cost. The section ends as follows:

> All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Section 4 provides that upon entry of teas at the custom-house, the importer or consignee shall give a bond to the collector that the merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption. At the port of New York there is a special officer assigned to this duty and known as the examiner of teas.

Section 5 provides that (in the absence of any protest against the examiner's decision) if the tea be found equal to standard, "a permit shall at once be granted to the importer or consignee, declaring the tea free from the control of the customs authorities." If found below standard, it shall not be released.

Section 6 provides that "In case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States General Appraisers to be designated by the Secretary of the Treasury." If found equal to standard by this board, a permit shall be issued. If the contrary, it must be exported out of the limits of the United States within six months, or the collector at the expiration of that time shall cause the same to be destroyed.

Section 10 provides that "The Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations."

The other sections contain certain administrative regulations, provide against the reimportation of rejected teas, and repeal (as to future importations) the prior act of March 2, 1883, *in pari materia*.

ARGUMENT.

I.

Assuming the act of 1897 to be unconstitutional, nevertheless complainants have mistaken their remedy.

Complainants seem to suppose that anybody who suffers pecuniary loss by reason of the execution by Federal officers of a Federal statute claimed by him to be unconstitutional, may have the constitutionality of the statute promptly tested by suit for an injunction against the enforcement of the law. If this be true, all the constitutional questions arising, or which anybody may think arise, under the laws of the United States, may indeed be promptly tested; but it is very strange that so prompt and efficient a remedy has been overlooked by the jurists of the past. It would have been most convenient in 1828 at the time of the great discussion over the constitutionality of the tariff, and in 1868 during the contest over the tenure-of-office act, as well as on other occasions which will occur to the minds of the court.

This bill is based on certain authorities sustaining injunctions against State officers, restraining them from the enforcement of State laws which are repugnant to the

Federal Constitution. The jurisdiction of the Federal courts is exercised very much more freely against State officers than against officers of the coordinate branches of the United States Government. Yet even a bill alleging unconstitutionality of a State statute would not be sustained in a case like this.

Assuming for the present the unconstitutionality of this act of 1897, we shall show, first, that the constitutionality of a Federal statute will not be considered upon an application for an injunction against its enforcement; second, that the complainants have no vested rights sufficient to support an application for an injunction against a Federal executive officer; third, that the existence of an adequate remedy at law, as in this case, would defeat such an application, even were it against a State officer concerning an unconstitutional State law; and finally, that these complainants are not in a position to invoke this discretionary equitable process.

(1) *The constitutionality of a Federal statute will not be considered upon an application for an injunction against its enforcement.*

Although an unconstitutional law is no law, yet the courts show sufficient respect to Congress not to interfere in this summary manner. This was one of the grounds of denying relief in *State of Mississippi* v. *Johnson* (4 Wall., 475, 500), where Chief Justice Chase said:

> Had it been supposed at the bar that this court would in any case interpose by injunction to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Since the leading cases of *Kendall* v. *United States* (5 Cranch, C. C., 163, 12 Pet., 524) and *Decatur* v. *Paulding* (14 Pet., 497), the practice of the Federal courts as to original writs of mandamus and injunctions against Federal executive officers has been radically different from their practice in relation to State officers. The respect entertained, or at least exhibited, by the judiciary toward the coordinate executive branch of the Government has been such that process of this kind, enforceable only by contempt proceedings, has never issued simply because of a difference of opinion as to the true construction of the Federal statute. Upon such an application the statute is regarded much as if it came up under the modern code practice upon an application for judgment upon a demurrer as frivolous. Process issues only when the question is too plain for argument. This is the effect of the decision in the Decatur case. (14 Pet., 497, 515, 521, and see dissenting opinions at pp. 577, 606.) The rule has been since applied in a series of familiar cases, of which we may cite as examples among recent mandamus cases *United States ex rel. Dunlap* v. *Black* (128 U. S., 40, 48); *United States* v. *Lynch* (137 U. S., 280, 286); *Seymour* v. *South Carolina* (2 D. C. App., 240, and cases cited); and *Carlisle* v. *Waters* (7 D. C. App., 517, 522–523). Among injunction cases we may cite *Gaines* v. *Thompson* (7 Wall., 347, 352–353) and *Litchfield* v. *Register and Receiver* (9 Wall., 575, 577–578). In fact, in only three cases have original writs of mandamus against executive officers ever been sustained by this court (see *Seymour* v. *South Carolina*, *supra*), and the only such injunctions which have ever received this

court's approval were those in *United States* v. *Nourse* (9 Pet., 8), where the remedy was based upon a special statute, and in *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), (where it may be remarked that the Government raised no point as to the form of remedy).

The doctrine of the State of Mississippi case, above cited, would seem to be that when Congress gives an interpretation to the United States Constitution by legislation, and when the Executive confirms this interpretation by enforcing the legislation, then the courts can not say that the question is too plain for argument or that the position taken by two out of the three branches of the United States Government is frivolous.

Only one other attempt, so far as we are aware, has been made since the State of Mississippi case to test the constitutionality of a Federal statute by an injunction suit against the officer charged with the duty of executing it. That instance was the suit of *Moore* v. *Miller* (5 D. C. App., 413), attacking the validity of the income tax of 1894. The bill having been dismissed by the lower court, the case was argued in this court, together with the two income tax cases reported in 157 and 158 U. S. Its only distinction from those cases was in the form of remedy. No decision was rendered by this court at the time of deciding the two other cases, and it still remained undecided when, many months later, the appeal was dismissed by Mr. Moore at his own costs. (163 U. S., 696.)

The divergence between the Federal jurisdiction in these matters and that of the States and of Great Britain is partly historical in origin. The experience of the earlier

years of our Government had taught both the Executive and the judiciary that their relations to each other must be treated with great delicacy in order to avoid unfortunate conflicts of jurisdiction. This danger had been pointed out by the Marbury case, the Aaron Burr case, and others. The whole matter was finally brought up in a most striking manner in the case of Postmaster-General Kendall, above quoted; and both that officer and Attorney-General Butler filed solemn protests against the exercise of any jurisdiction which would involve possible contempt proceedings against officers of a coordinate branch of the Government. (5 Cranch, C. C., 192–199, 221–225.) The case was most elaborately argued in 1840 before a supreme bench of whom five had been prominent in Congress, three had been Cabinet officers, and four had been upon the bench in their respective States. The decision reached by a majority of these learned justices has as yet remained unshaken in this court.

(2) *The complainants have no vested rights sufficient to support an application for an injunction against a Federal executive officer.*

As above pointed out, the only case in which (apart from special statute) an injunction like the present has been sustained in this court is that of *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165). In that case interference of some sort was necessary in order to protect a vested legal right of property—property acquired before any suggestion of an attempt on the part of the Executive to take it away. The complainant in that case

stood more as these complainants would have stood had their teas been imported prior to the act of 1897, and entered at the custom-house on the day after the regulations under that statute took effect.

But these complainants have no vested right to protect, unless everybody has a vested right to import merchandise of all kinds, pure or impure, wholesome or unwholesome. The act was approved March 2, 1897. None of the teas in question arrived prior to November of that year. It is not claimed that they were purchased before the act, and the regulations and standards adopted thereunder, had been publicly promulgated and had become well known to these complainants. It is the fair inference from their bill of complaint that when they first became aware of the statute regulations and standards their money was still in their pockets. They did not need to invest it in impure and unwholesome teas. So far as appears by the bill (and this is in all probability the fact), they so invested with their eyes open, taking the chances of exclusion on account of the very great profit which they would make if they could get the teas into the country, either by negligence in the custom-house or by this suit.

But there is no vested right to import goods into this country. Congress has the power to exclude any or all articles from foreign commerce (II, *infra*). This right it may exercise by direct prohibition if it pleases, although the more common method is by prohibitory impost duties. Notwithstanding the general right of a citizen to pursue any honest vocation, there are many exceptions (*United States* v. *Joint Traffic Association*, 171 U. S., 505, 572,

573); and this Congressional power to curtail or prohibit the importation of goods from abroad is one of the longest recognized of these exceptions. As remarked by Judge Lacombe in this case, "No citizen of the United States has a vested right to import teas, if Congress, under its power to regulate commerce, prohibits their importation." (Record, p. 7; 86 Fed. Rep., 7; see also *Sang Lung* v. *Jackson*, 85 Fed. Rep., 502, 505, 507, De Haven, J.)

(3) *Even were this a suit against a State officer concerning an unconstitutional State statute, the bill would be dismissed because there is an adequate remedy at law.*

Section 723 of the Revised Statutes, limiting the equity jurisdiction of the federal courts, is but declaratory of the general principles of chancery courts. (Cases cited in 1 Gould and Tucker's Notes, 201; 2 id., 84, 85.)

It is to be borne in mind that the destruction of these teas would be entirely compensable in damages. It appears that they have a known value. Nor is it suggested that the destruction of these five lots would have any indirect effect upon the complainants' business.

Nor is it alleged that the defendant is pecuniarily irresponsible, so that a judgment for damages against him would be uncollectible. On the contrary, such judgment would be collectible out of the funds in the United States Treasury under section 989 of the Revised Statutes.

Nor does it appear—it is not even claimed—that there would be any multiplicity of suits in case complainants were left to their remedy at law. It is alleged that complainants intend to import from time to time other in-

voices of tea; but it is not alleged that they intend to import impure or unwholesome teas. It is alleged that the collector "threatens and intends to seize and hold such teas," etc.—that is, the teas which complainants intend to import; but this would only lead to the result that in addition to the cause of action which they may now have against him they will have one or more such causes of action in the future. Such threatened future action could not have any indirect effect upon complainants' business in the future not compensable in damages, for complainants will be unmolested in the tea business if they confine themselves to a pure and wholesome article of decent quality.

If this statute be unconstitutional, its provisions and the regulations of the Secretary of the Treasury thereunder would be no defense to an action for damages for tort. (*Poindexter* v. *Greenhow*, 114 U. S., 270; *Scott* v. *Donald*, *infra*.)

Nor would the fact that the defendant was a public officer in any way affect the right of action of the injured party (*Little* v. *Barreme*, 2 Cranch., 170; *Gelston* v. *Hoyt*, 3 Wheat., 246; *Bates* v. *Clark*, 95 U. S., 204; *Stanley* v. *Schwalby*, 147 U. S., 508, 518).

If this statute be unconstitutional, the acts of the collector in withholding and destroying the property are as tortious as those of the South Carolina State constable under the dispensary act, discussed in *Scott* v. *Donald* (165 U. S., 58).

There is no general jurisdiction in equity to enjoin trespasses or conversions of personal property committed by Government officials any more than there is general

jurisdiction to restrain them when committed by private individuals. Examination of the cases where injunctions have been granted against the enforcement of unconstitutional State tax laws show that in all cases the bills were based upon good equitable grounds, such as the prevention of clouds upon the title to real property, or real multiplicity of actions.

An example of the cases where an equitable remedy is proper is given by *Union Pacific Railway Co.* v. *Cheyenne* (113 U. S., 516, 526, 527), where the injunction was based on the fact that enforcement of the tax would "involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold, would prevent their sale, and would cloud the title to all its real estate."

The injunctions in *Osborn* v. *United States Bank, Cummings* v. *National Bank, Virginia Coupon Cases*, etc., are explained by Chief Justice Fuller in *Shelton* v. *Platt* (139 U. S., 591, 599), which was a suit brought by Thomas C. Platt as president of the United States Express Company on behalf of himself and his associates, who were too numerous to be joined as parties, to restrain the collection of a license tax by the State of Tennessee, alleged by him to be unconstitutional. He averred that a distress warrant had issued against the property of his company for the license taxes of 1887 and 1888, and that another distress warrant was threatened for the year 1889. The bill averred that if the property was seized the company would be subjected to loss, and that it was without adequate remedy at law. It was admitted that the company could pay the license tax under protest and

sue to recover it back. The decision is accurately stated in the syllabus as follows:

> While an unconstitutional tax may confer no right, impose no duty, and support no obligation, the trespass resulting from proceedings to collect such void tax can not be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist.

The question came up again in *Allen* v. *Pullman's Palace Car Company* (139 U. S., 658) where, as correctly stated by the syllabus, the court, speaking again by Mr. Chief Justice Fuller, held as follows:

> Purely injunction bills can not be maintained to restrain the collection of taxes upon the sole ground of their unconstitutionality. * * * When in a suit in equity this court finds, on examining the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel.

The principle is again reaffirmed in *Pacific Express Company* v. *Seibert* (142 U. S., 339, 348). In the Supreme Court in that case Mr. Justice Lamar said:

> But when the illegality of the tax, or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further and make out a case that can be brought under some recognized head of equity jurisdiction—such as that the collection of the tax sought to be restrained *may entail a multiplicity of suits, or cause some other irreparable injury; as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of the complainant.*

A good example of the kind of cases in which equitable jurisdiction is based upon inadequacy of legal remedy for injury to personal property is *Watson* v. *Sutherland* (5 Wall., 74), where the court enjoined the execution of writs of *fi. fa.*, which would have destroyed the good will of a going concern and blasted the credit of its proprietors.

A good example of the kind of cases in which equitable jurisdiction can be based upon multiplicity of suits is *Smyth* v. *Ames*, 169 U. S., at pages 517, 518, where, as Mr. Justice Harlan pointed out, "the transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute."

The present bill is avowedly based on the case of *Scott* v. *Donald* (165 U. S., 107), which arose under the South Carolina dispensary laws. It was accompanied to this court by a common-law judgment for damages in tort upon similar facts (165 U. S., 58). The general objections to injunctive relief seem not to have been pressed before this court, the objection made being simply "that it is in effect proceeding against the State itself, and that it interferes with the official discretion vested in the officers" (p. 112). The circuit judge certified that the legal right of complainant had already been adjudged in an action at law between the same parties (Record, p. 40). The agreed statement of facts showed eleven seizures by various constables, of whom all, except in one case, were "insolvent and financially irresponsible" (id., p. 58), and that three judgments had already been given against the

defendants for similar seizures (id., p. 56). The pleader's reliance on that case perhaps explains the curious omissions in this bill of complaint. All importations of liquor were forbidden by the South Carolina law. Hence it was sufficient to allege in that case that complainant intended to continue his importing business. All importations of tea are not forbidden by this law; and here, too, the pleader was unable to allege multiplicity of actions, because his clients' business was confined to the single collection district of New York.

(4) *These complainants are not in a position to invoke this discretionary equitable process.*

An injunction is granted only in the equitable discretion of the court. (*Truly* v. *Wanzer*, 5 How., at pp. 142, 143; *O'Reilly* v. *N. Y. Elevated R. R. Co.*, 148 N. Y., 347, 353–355; *Wormser* v. *Brown*, 149 N. Y., 163, 172–173.)

In this case complainants are endeavoring by injunction to prevent the enforcement of an act intended primarily to protect the consumers of this country from impure and unwholesome food. There is no allegation in the bill that the decision of the Treasury officials in the complainants' case was erroneous. The bill, by not denying, admits that the teas in question were impure and unwholesome. Asking this court to enforce the admission of these objectionable articles into the United States shows extraordinary courage.

II.

The act is constitutional.

It has not been disputed in the lower courts that Congress has the power to exclude impure and unwholesome teas, or teas of a quality which it regards as worthy of condemnation; and we submit it to be equally true that Congress can delegate to the Secretary of the Treasury the power and duty to ascertain and fix the standards of purity, quality, and wholesomeness.

(1) *Every intendment must be in favor of the validity of the statute.*

The rule was laid down as follows by Mr. Justice Peckham in the *Gettysburg Park Case* (160 U. S., 668, 680):

> In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the Government.

Among other leading cases to the same effect we may cite *Pine Grove* v. *Talcott* (19 Wall., 666, 673); *Nicol* v. *Ames* (173 U. S., 509, 514–515); *Commonwealth* v. *Blackington* (24 Pick., 353, 355).

(2) *Congress has the power to exclude any article from foreign commerce.*

The truth of this proposition was recognized by all of our early statesmen and constitutional writers, and has

never, so far as we are aware, been seriously disputed. During the first twenty-five years of our constitutional history Congress repeatedly went to the extent of prohibiting all foreign commerce whatever. When it did this by an embargo without limit of time—that is, when it passed what was in effect a permanent law abolishing all foreign commerce—the constitutional point was raised; but it was overruled by the district judge in Massachusetts (Hon. John Davis) in *United States* v. *Brigantine William* (2 Hall's L. J., 255, 28 Fed. Cas., 614). The point was not raised in any of the numerous cases under the embargo law which reached the Supreme Court of the United States, and the unlimited character of the power has since been conceded (2 Story on the Constitution, secs. 1290, 1292; 1 Kent, 431–432). Thus, for fifty years all drugs, medicines, and chemicals below a certain degree of strength have been excluded. (9 Stat., 237; Rev. Stat., sec. 2933 et seq.) The right to exclude any article from commerce with the Indian tribes, Congressional power over which is identical, is well settled. (*United States* v. *43 Gallons of Whisky*, 93 U. S., 188, 194, 195.)

Indeed, the power of Congress to levy prohibitory and protective tariff duties, when so hotly challenged during the great disputes from 1824 to 1833, was based by Madison, Clay, Grimké, Verplanck, and its other leading defenders, upon the power to regulate commerce. (See passages quoted in the brief for the plaintiff in error in the sugar-bounty case, *United States* v. *Realty Company*, October term, 1895, Nos. 869–870, at pp. 142–152.)

The powers of Congress over foreign commerce are at least as broad as those of the States over domestic production. But the latter may prohibit the manufacture of an inferior article. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

The power to regulate commerce with foreign nations being an enumerated power, it is entirely unlimited (when not violating any of the specific constitutional restrictions upon legislative authority). An enumerated power is "distinct and independent, to be exercised in any case whatever." (*McCulloch* v. *Maryland*, 4 Wheat., at pp. 421–422; see *Doyle* v. *Continental Insurance Co.*, 94 U. S., 535, 541.) It acknowledges no limitations other than those prescribed in the Constitution. (*Leisy* v. *Hardin*, 135 U. S., 100, 108.) It may be used for any lawful purpose. Thus, while Congress has no direct right to regulate agriculture and manufactures (*United States* v. *E. C. Knight Co.*, 156 U. S., 1), it may regulate commerce or adjust taxation for the encouragement of those industries. While it has no direct right to regulate the descent of real property in the various States, yet under the treaty-making power it can alter the laws of descent on behalf of the subjects of European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.)

The reasons for the exclusion of impure and unwholesome tea are obvious. The circuit court of appeals has held that the exclusion of teas of very low quality was for similar reasons—"to exclude the lowest grades of tea whether *demonstrably* inferior in purity or unfit for consumption or *presumably or possibly* so, because of their

inferior quality." (*Buttfield* v. *Bidwell*, 96 Fed. Rep., 328.) The Senate committee's report on the bill shows that Congress also excluded the very low qualities of tea for the further reason that their introduction was thought to tend in the long run to restrict the consumption of tea in the United States. (Senate Report 1527, Feb. 23, 1897.)

(3) *The statute involves no violation of due process of law.*

Appellants insist that there is a violation of their constitutional rights, because the final decision as to the admission or exclusion of the teas is confided to administrative officers "without hearing allowed the importer." But there is no provision in the statute depriving the importer of a hearing. He has the right of appeal to the Board of General Appraisers, who make the final determination "after due examination."

The Constitution does not require, however, that there should be anything like a trial at law in a case of this kind. The practice under this statute is analogous to that under the statutes for the collection of the customs revenue. Questions of fact in such matters may be decided upon inspection by the Appraisers themselves, assisted by such experts as they may choose to call in. (*Origet* v. *Hedden*, 155 U. S., 228, 236–8; *Auffmordt* v. *Hedden*, 137 U. S., 310; *Hilton* v. *Merritt*, 110 U. S., 97, 107.) Another parallel practice is that of the Treasury Department under the statutes prohibiting the admission into the country of alien immigrants who may become a public charge. It is said by this court in *Nishimura Ekiu* v. *United States* (142 U. S., 651, 663): "The statute

does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land." The constitutionality of this practice was fully considered and sustained in the case cited, the court partly basing itself upon the Hilton case, *supra*. The same practice has been sustained in the case of the anti-Chinese legislation. (*Lem Moon Sing* v. *United States*, 158 U. S., 538.)

Appellants attempt to distinguish these authorities, claiming that they are based upon some peculiarity inherent in revenue matters, and in the power to exclude aliens. No distinction is tenable. Indeed, as above shown, all of our protective duties have always been based upon the power to regulate commerce, the same power which is the basis of this statute. The power to exclude foreign goods from the country is an exercise of an express and enumerated power in the Constitution. The power to exclude alien passengers is an implied power. Otherwise the two are precisely analogous. The practice which is constitutional when directed against foreign persons arriving in the country is *a fortiori* constitutional when exercised against foreign goods.

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How., 272), the court pointed out that in considering whether a statute is consistent with due process of law it is of importance to consider the generally recognized practice in similar matters at the time of the adoption of the Constitution. Examination of the then prevailing practice as to the importation of foreign goods will show that it recognized no general right of importa-

tion at all. Indeed, no policy was more common than that of limiting such commerce from any given foreign country to one or more individuals licensed by the legislature or the Executive for that purpose (Leone Levi, History of British Commerce, 2d ed., pp. 30, 109, 235, 236; Adam Smith, Wealth of Nations, Book IV, Ch. I; New York Statute of March 15, 1781, ch. 29; 9 Hening's Virginia Statutes, 1778, p. 532). From the start Congress wisely refrained from granting similar monopolies in time of general peace, but when commerce was from time to time laid under a general embargo during the foreign wars, the right was recognized to give the President the right to issue similar licenses (2 Stat., 500, 506). The power to regulate commerce with the Indian tribes is contained in the same clause as the power to regulate foreign commerce, and is of equal scope. One of the early acts of Congress confined the right to trade with the Indians to persons holding special licenses (1 Stat., 329).

The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; that the importation of goods from abroad is by permission of Congress, and that it is subject to such restrictions as Congress may see fit to impose and to the supervision of such officials as Congress may see fit to provide for that purpose.

Appellants also make the novel suggestion that it is unconstitutional to provide a physical standard of comparison, since such standard can not be expressed in lan-

guage, and there is danger of deterioration in the object selected. They insist that tea is a peculiarly perishable and changeable article. This, however, is a question for Congress to decide. If it has no power to provide a physical standard of tea, it has no power to establish a physical standard of anything; and a method of commercial regulation which may appear to Congress to be the best conceivable in many cases is excluded from its jurisdiction altogether.

Such an argument would forbid the establishment by law of a standard of weight or measure, for a standard is a physical object and perishable in nature, although not to the same extent as tea. The Treasury Department at an early day had established physical standards of weight and measure. (5 Stat., 133.) Nor has the practice been confined to materials of such slight perishability as those just referred to. At least as early as 1867 the Treasury Department, under statutory direction, commenced the system of preserving standard samples of wool and hair for the purpose of comparison, precisely as under the present act. (14 Stat., 560; Rev. Stat., sec. 2916.) As early as 1864 the statutes provided for the preservation of standards "by which the color and grades of sugar are to be regulated." (13 Stat., 202; Rev. Stat., sec. 2914.) Neither of these provisions was ever attacked on constitutional grounds. Yet it is fairly presumable that no arguable objection to our tariff laws can have been so long left unraised. There has been no dearth of wool or sugar cases in this court, where the practice of the United States Treasury has been questioned by the ablest and most ingenious of counsel. Wool is indeed a less

changeable article than tea, but sugar is, if anything, more changeable. It was this sugar statute which was the subject of discussion in *Merritt* v. *Welsh* (104 U. S., 694, 702–705). The court said that the adoption of standards was "to insure certainty and uniformity," etc. The Secretary performed his duty under the act "by procuring the standards from the proper parties at Amsterdam and furnishing them to the collector."

It remains to consider whether the power to fix the *minimum* of purity, quality, and wholesomeness, below which tea should not be admitted into the United States, can be delegated by Congress to the Secretary of the Treasury.

(4) *Congress may delegate to the Executive the power to fix standards of purity and wholesomeness.*

Laying aside for the present the discussion of standards of "quality," we shall first consider the question whether Congress, having prohibited in general terms the admission of impure and unwholesome teas, can leave it to the Secretary of the Treasury to fix the exact percentage of impurity and the exact degree of unwholesomeness which will be deemed sufficient to require the enforcement of the prohibition. A slight degree of impurity occurs in many or most articles of commerce. Between wholesomeness and unwholesomeness there is a gradual gradation—a borderland of doubt which requires some authoritative definition of the dividing line.

The bill of complaint in the case at bar does not state on which ground this tea was excluded, but simply that

it was found to be "inferior in some or all of the respects designated in said act of Congress, either as to purity, quality, or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States." (Record, pp. 1–2.) Since the complainants do not claim to have imported pure and wholesome tea, their bill may properly be treated as an attack on the constitutionality of the provision for establishing standards of purity and wholesomeness.

Although a statute may be unconstitutional in part, effect is to be given to it so far as may be when the valid and invalid portions of the statute were divisible. The test is whether the legislature would probably have enacted the constitutional portions had they had to stand alone. (*Allen* v. *Louisiana*, 103 U. S., 80–84; *Packet Co.* v. *Keokuk*, 95 U. S., 80–89.)

The provisions in the present statute with respect to the establishment of a standard of quality are clearly divisible from those relating to purity and fitness for consumption. They were indeed introduced by an amendment in the Senate but a few days before the passage of the bill. (Senate bill 3581, and Senate report 1527 accompanying the substitute bill 3725, Fifty-fourth Congress, second session; *Buttfield* v. *Bidwell*, 96 Fed. Rep., at p. 329.)

Comparison of the present statute with the original bill, prior to the introduction of the word "quality," shows that the words "fitness for consumption" in the prohibitory clause of the act correspond to the word "unwholesome" in the title. The questions, then, are as follows: Can Congress, having decided that teas con-

taining a substantial degree of impurity shall be excluded from the United States, delegate to the Secretary of the Treasury the duty of establishing a standard which shall be the test of substantial impurity? Can Congress, having decided that teas found to be unwholesome shall be excluded from the United States, delegate to the Secretary of the Treasury the duty of establishing a standard which shall decide, when doctors disagree, the question of unwholesomeness?

To deny this right to Congress would be to deny the right to enact effective legislation upon the subject. Experience under the act of 1883 *in pari materia* had shown that in order effectively to exclude impure and unwholesome teas "the establishment of uniform standards * * * had become a recognized necessity." (*Buttfield* v. *Bidwell*, 96 Fed. Rep., at p. 329.) These standards are not word-descriptions which can be inserted in a statute book. They are actual packages of tea, which are divided up into small lots and distributed to the custom-houses, to persons engaged in the tea trade here, and to their purchasing agents or principals in the tea-raising countries. In order to obtain a uniform and efficient administration of the law, it has been found necessary that the importer of teas and the Government examiner shall be in possession of duplicate samples of the same standard, so that the former may know precisely what instructions to give to his buyer, and that the sight, smell, and taste of the latter may have a definite test to refer to.

For tea is a commodity raised mostly in semi-civilized lands, difficult or impossible of access, by persons of strange customs, speaking an unknown tongue,

and subject to no inspection laws. The leaves are subject to adulteration by mixing with the leaves of many other plants, and in the greatest tea-producing country it is an established avocation to go around among the restaurants, collect the leaves which have once been used in the preparation of the beverage, and put up these "exhausted" leaves for export to nations of "barbarian devils" who are supposed to know no better than to use them a second time. Coloring matter is used ingeniously to touch the leaves up. In order to avoid detection of adulteration, the leaves are broken into fragments known in the trade as "dust." Impurities such as smokiness, supposed to result from improper firing, can be detected only by the senses of taste and smell; but the employment of the senses of taste and smell can not be accurately guided by any statute limits.

It has often been laid down as an axiom of constitutional law that a Federal or State legislature can not delegate legislative power. The axiom, however, is one which very seldom invalidates a statute. The line between the province of the legislature and that of the executive is difficult to determine, and, by application of the fundamental principle of constitutional law, the statute is to be given the benefit of any doubt. Carrying into effect in detail the legislative will is generally left to executive officers, although the details may be settled by the legislature if it desires to do so. There is thus a very broad field in which the legislative and executive functions are coordinate.

An extended discussion of the subject would seem to be unnecessary in view of recent decisions of this court,

which recognize that to rigidly enforce the doctrine that Congress can not delegate legislative power would often in effect be a restriction upon legislative power, and which allow to Congress very wide latitude in this respect.

The leading authority is *Field* v. *Clark* (143 U. S., 649, 680–694). That case discussed the reciprocity clause of the McKinley tariff act of 1890, which authorized and directed the President to levy certain import duties upon the products of foreign countries whose tariffs "*he may deem to be* reciprocally unequal and unreasonable." Strong attack was made upon the law on the ground that there was no standard of inequality or unreasonableness fixed, so that the President was in effect given a legislative discretion. The objection was overruled, only two justices dissenting. Among the precedents cited in the report of the case is the act of 1874 permitting the President to suspend the consular courts of Turkey and Egypt whenever he shall "receive satisfactory information" that the governments of those countries have "organized other tribunals likely to secure to citizens of the United States in their dominions the same impartial justice which they now enjoy there," etc.

The McKinley reciprocity clause is very similar in construction to the present act. Congress indicated a desire to retaliate against all foreign tariffs which are "reciprocally unequal and unreasonable," but gave no indication as to what its standard of inequality and unreasonableness would be. On the contrary, it most expressly left the determination of this matter to the President and intrusted to him the sole responsibility of putting the law into effect, leaving his discretion entirely

untrammeled. So in the present statute, Congress having indicated that it desires tea imported in the future to be substantially pure, good in quality, and fit for consumption, turns the matter over to the Secretary of the Treasury and the assistants whom he is authorized to call together, knowing them to be much better qualified than itself to fix standards for the carrying into effect of the legislative will.

Tremendous legislative powers were delegated to President Washington by some of our earliest legislation. Thus by the act of June 4, 1794, chap. 41 (1 Stat., 372), he was, "*whenever in his opinion the public safety shall so require*, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same *whenever he shall think proper;*" the embargo to terminate in fifteen days from the next actual meeting of Congress. No standard was given him to which to refer. Similar wide powers were four times granted to Presidents Adams and Jefferson (1 Stat., 615; 2 Stat., 9–10, 352, 411). The tonnage act of March 3, 1815 (3 Stat., 224), repeals discriminating duties as to any foreign nation whenever the President "*shall be satisfied* that the discriminating or countervailing duties of such foreign nation, *so far as they operate to the disadvantage of the United States*, have been abolished." Here again no standard was given him. He was merely to exercise the act—legislative in essence—of deciding whether a certain condition of things was generally disadvantageous to the

United States. More radical powers, with a discretion at least equally wide, were granted by the Canadian reciprocity act of March 3, 1887 (24 Stat., 475). Equally wide discretion is given by the food acts (Rev. Stat., sec. 2494; act of August 30, 1890; 26 Stat., 414).

These and similar enactments are set forth in the opinion of the majority in *Field* v. *Clark, supra.* We proceed to the enumeration of some which were not there mentioned.

In *Dunlap* v. *United States* (173 U. S., 65), the tariff act of 1894, as construed by this court, provided for a rebate of the alcohol tax to manufacturers in case the Secretary of the Treasury should find that such rebate was practicable and make regulations accordingly. The Chief Justice said, in delivering the opinion of the court (p. 71): "But if the right of the manufacturer could not enure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary, or if he had found that it was not practicable to enforce such as he believed necessary without further legislation, then it is obvious the right to the rebate would not attach." The constitutionality of this legislation was strenuously attacked by the able counsel who appeared for the manufacturers, but the majority of the court held that Congress "may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, *and if so, whether further legislation would be required.* It is true that the right to the rebate

was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so." (p. 74.)

It has been held in lower courts that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decision is to the contrary. (*United States* v. *City of Moline*, 82 Fed. Rep., 592.) The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defense. (*United States* v. *Ormsbee*, 74 Fed. Rep., 207, 209, and cas. cit.)

The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great. We may refer, for instance, to the provisions of the civil-service act requiring that standards of fitness for office be established, but leaving it to the President to fix the standards. The constitutionality of such provisions has always been upheld. (Opinion of Justices, 138 Mass., 601.)

No complaint seems ever to have been made of the act of June 26, 1848, chapter 70, "to prevent the importation of adulterated and spurious drugs and medicines" (9 Stat., 237; Rev. Stats., sec. 2933 *et seq.*), because it delegates power to determine the standards of "quality, purity, and fitness for medical purposes." That act was the prototype of the act now under discussion. The standards are not even fixed by an executive officer of

this Government, but by "the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories." (Sec. 2935.) The Treasury regulations are similar to those under the tea act. Thus among the articles admitted are "aloes when affording 80 per cent of pure aloetic extractive." Under "opium" is a provision that "the percentage of morphia contained in imported crude opium must be ascertained by what is known as Dr. Squibb's method of analysis." Under "rhubarb" is the following: "None admissible but the article known as East Indian, Turkey, or Russian rhubarb." (Customs Regulations, 1892, pp. 370–372.)

A recent example of the delegation of power to fix a standard for use in regulating foreign commerce is to be found in the provision for the free admission to this country of animals of "recognized breeds," the recognizing power being the Secretary of Agriculture. (Tariff of 1897, paragraph 473.)

By the Alaska act of July 27, 1868, c. 273 (15 Stat., 240, 241, 246; Rev. Stat., secs. 1955, 1956), the importation and use of firearms was made subject to the discretion of the President, while the power to make game laws as to fur-bearing animals was delegated to the Secretary of the Treasury.

The Secretary of the Treasury is also made the sole judge of the expediency of increasing the subsidiary copper coinage. (Act of February 12, 1873, c. 131, sec. 30; 17 Stat., 429; Rev. Stat., sec. 3529.)

Congress can authorize the Secretary of the Treasury or Secretary of the Interior to require, in their discretion,

oaths the violation of which is ground for prosecution for perjury. (*United States* v. *Bailey*, 9 Pet., 238; *Caha* v. *United States*, 152 U. S., 211, 219.)

It can delegate to the Postmaster-General the power to determine what constitutes a lottery, and exclude its circulars from the mails. (*Enterprise Savings Asso.* v. *Zumstein*, 37 U. S. App., 71.)

These are but instances selected from an immense variety to be found in the Federal statute books to the same effect.

Similar instances may be found everywhere among the statute books of the various States and decisions thereunder.

Thus we may refer to the discretion given to the courts as to the admission of attorneys, which is not confined to the case of attorneys who are to exercise the privilege of appearing in court. So the establishment of a standard of fitness for admission to medical practice may be fixed by a State medical society or university. (*Hewitt* v. *Charier*, 16 Pick., 353.)

In *State* v. *Heinemann* (80 Wis., 253, 257, 258) a number of statutes are referred to, which have received the approval of the courts, which grant to State boards the right to examine and license candidates for entrance into certain occupations, such as medicine, dentistry, pharmacy, plumbing, and locomotive engineering. The standards of quality are fixed by these boards.

In *Dent* v. *West Virginia* (129 U. S., 114, 122) Mr. Justice Field refers to the common legislative practice "to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely,

their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal." In the case cited one of the qualifications for the practice of medicine was a diploma from "a reputable medical college in the school of medicine to which the person desiring to practice belongs." The State legislature thus delegated the fixing of standards to non-official bodies whom it considered more competent in that particular than itself.

In *Martin* v. *Witherspoon* (125 Mass., 175) it was held proper to authorize the governor and council "to prescribe under what circumstances outgoing vessels shall be compelled to take pilots."

In re Flaherty (105 Cal., 558), quoted by this court with approval in *Wilson* v. *Eureka City* (173 U. S., 32, 36–37), an ordinance giving a single municipal officer absolute discretion to permit or forbid the beating of drums on the street was sustained; and the courts cite a large number of similar decisions. This court in the latter case cites also an ordinance allowing the mayor of Boston to decide whether anyone shall be allowed to address the public in public grounds.

This license system, so common in our municipalities, is a yet more advanced instance of the delegation of discretion to the executive officers; for they are not required to establish standards at all, but may limit the number of licenses to be issued and select the licenses according to

their own discretion. At a time when all foreign commerce was interdicted by embargo, and the coasting trade was put under heavy restrictions, a licensing power was given to the President, to be exercised according to his discretion. (Embargo acts of 1808–9, 2 Stat., 500, 506.)

Of similar character, as pointed out by Judge Cooley, was the power given to the President during the civil war to suspend the writ of *habeas corpus*. (Cooley's Constitutional Law, 2d ed., pp. 100–101.)

The decisions of the various State courts (there are no such decisions of this court) holding statutes to be void as involving a delegation of legislative power are based upon a rigid theory as to the division of power between the three coordinate branches of the Government, which theory has been found so impracticable that it has been very much relaxed by the general weight of authority. Many interesting instances might be quoted where these spheres have been held to overlap.

Thus the pardoning power is granted by the Constitution to the President; but the remission of penalties, which is a branch of the pardoning power, was assumed from the time of the First Congress to be within legislative jurisdiction (6 Stat., 3), and was then delegated by Congress to the Secretary of the Treasury. (*The Laura*, 114 U. S., 411, and statutes cited.)

The recent case of *United States* v. *Duell* (172 U. S., 576) sustains a direct appeal from the Commissioner of Patents to the court of appeals for the District of Columbia, thus affording a most striking illustration of the principle that the same act may be both executive and judicial in character; and other instances to the same effect

are collected in the article on "Federal Judges and Quasi Judges" in 6 Yale L. J.

In *City of Wahoo* v. *Dickinson* (23 Nebr., 426) and *City of Burlington* v. *Leebrick* (35 Iowa, 252), it was held that the legislature could authorize the courts to decide whether certain territory would receive material benefit from annexation to a city, or whether justice and equity required such annexation, and if so to annex it by judicial decree, thus delegating a legislative question to the judiciary.

Rules of court sometimes revolutionize the settled methods of procedure in litigation. Such rules are legislative in character, the right to legislate in this manner being delegated to the courts.

We have thus far argued this question of delegation of power as if it was really a broad constitutional principle, such as is claimed by the appellants, debarring the legislature from delegating any portion of its legislative discretion to an executive officer, even though the legislature should be of the opinion that the object which it desires to attain would be better effectuated by such delegation. It may be considered bold for us to contest this doctrine after it has been so often laid down by courts of authority, and even conceded in several opinions of this court. The doctrine never has, however, been made the basis in this court of a decision invalidating any particular statute. Every recognition which it has received in this court has been *obiter*.

It must of couse be conceded that the legislature can not delegate distinctively legislative functions to the

Executive or to the judiciary without the consent of the latter. No department can be made to do the duties of another department except by its own consent.

It may be safe to concede also, that a statute can be conceived of—although perhaps none has ever been actually enacted—which would be uncontestably void as a delegation of legislative power. Thus, if we assume that at the end of the second year of a presidental term one of the political parties is in possession of the three branches of the legislature (President, Senate, and House), and that the Senate and the House are about to pass into the control of the opposite party by less than a two-thirds majority, it may be conceived that a law might be enacted delegating the entire legislative power to the President for the remainder of his term; and such a statute may be conceded to be unconstitutional.

But we have already shown the doctrine to be full of exceptions, and we believe that the analogy of these exceptions, properly applied, would sustain every statute *which evinces upon its face a legislative belief that some executive or judicial officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires*—that no such statute can fail of operation unless the executive or judicial officer upon whom the burden is cast declines to bear it.

If we search for the origin of this doctrine, we shall find it in a time when the doctrines of Montesquieu concerning the radical separation of the legislative, executive, and judicial functions were far more unreservedly

confided in than at present. The decisions and statutes to which we have referred have largely broken down the sharp lines which had been supposed to exist, and shown that to a very large extent the three spheres overlap.

Few constitutional writers have made any reference to this doctrine. The only writer of prominence who considered it at any length is Cooley; and nothing could show its shadowiness more tellingly than the way in which he treats it. In the latest edition of his shorter work (Cooley's Constitutional Law, 2d ed., p. 100) he refers to four authorities besides his own former treatise. One of these is Locke's Treatise on Civil Government. Another is the purely obiter treatment by this court *In Re Rahrer* (140 U. S., 545). Another is *Barto* v. *Himrod* (8 N. Y., 483), which decided that the power to make a statute actually binding as law can not be delegated by the legisture to the people of the State. The fourth authority is *Rice* v. *Foster* (4 Harrington, 479), which held local-option laws to be unconstitutional. Now the last of these cases is universally or almost universally regarded as overruled, while the Barto Case has been often disapproved. (*Fell* v. *State*, 42 Md., 71, and cases cited.) Judge Cooley himself evidently experienced a considerable change of mind on this subject after his first discussion of it. Thus the text of his main work approves the rule in the Barto case (Cooley's Constitutional Limitations, 6th ed., p. 142); but the notes to the later editions of that work concede the "great force" of the remarks of Redfield, C. J., to the contrary in *State* v. *Parker* (26 Vt., 357); and finally come to the point of pronouncing that the position taken

by Dixon, C. J., to the contrary in *Smith* v. *Janesville* (26 Wis., 291), "though opposed to many others, appears to us entirely sound and reasonable" (id., pp. 143, 144, notes).

The decisions which were the original supports of this doctrine have thus been knocked from under it. We respectfully submit that the arguments by which their authority has been demolished, and the arguments of this court in the Field and Dunlap cases, which have made such great rents in this antiquated doctrine, will, if carried to their necessary conclusion, overrule every case in which the doctrine has been applied up to the present time; in other words, that, as applied to any form of legislation familiar to past experience, the doctrine has no practical existence at the present time.

(5) It is thus clear that the Secretary of the Treasury may receive a power to fix standards of purity and fitness for consumption. Were it necessary for the purposes of this case, we might proceed further and show that he may also fix standards of quality. The same line of argument would apply.

As the circuit court of appeals perceived in the Buttfield case above cited, the difficulty in detecting impurities is so great, and the presence of impurities is so much more common in the lower grades, that Congress could not fully effectuate its intent without requiring a test of quality also. This test likewise Congress itself could not practicably formulate, and its formulation was necessarily left to executive officers. Under the present bill of complaint it is unnecessary to prolong this already extended brief by further elaboration.

III.

In closing, a few words may be said about the public policy of this statute, and its actual effect as shown by experience.

The evils previously existing, and which the act of 1883 had failed to remedy, are to some extent set forth in the Senate report of February 23, 1897, above referred to. A great mass of very low-grade tea, or merchandise imported as tea, had come upon the American market and was being sold, although it was of a quality regarded in the trade as worthless. Its effect was believed by a great majority of the trade (and, on their representations, by Congress) to be a fraud upon the consumer, who would not make a second purchase; so that it tended to drive tea out of consumption altogether in the districts where these low-grade goods had been most successfully worked off. Certain reckless importers, while making great profits for themselves and disorganizing the whole trade, were thus not only giving opportunity for fraud by middlemen upon the consumer, but were inflicting injury in the long run upon the trade itself—an injury which would under the present conditions be shared by the United States Treasury, by diminishing the return from the revenue duty now collected from importers of tea. A great majority, as we are informed, of the persons constituting the tea trade of the United States—importers, jobbers, and retailers alike—have been led by their experience of the practical workings of this act to give it their entire approval. No complaint has been heard from the consumers. The

price to them has been raised little, if at all, while for the first time the tea consumed in the United States is now everywhere good. This great advance in our material comfort is the direct result of the act of 1897.

As above stated, the Secretary of the Treasury, aided by the boards of tea experts of 1897, 1898, and 1899, has used his best endeavors to fix standards so low that the cheapest teas which are pure and genuine, unaffected by foreign flavors, and possessing the flavor of tea in substantial strength, can come freely into the United States. Cheaper grades are regarded as doubtful in purity, even though impurity can not affirmatively be shown. At the very start it was endeavored to establish a standard for each producing district. (*Syn. Dec.* 17995, Apr. 21, 1897.) When the Sang Lung case above cited, and the complaints out of which it arose, showed that one district had been overlooked, it was immediately added by a supplemental order of the Secretary. (*Syn. Dec.* 18554, Nov. 6, 1897.) Since the flavor is necessarily used as a test of fitness for consumption, it was also expressly ordered that it should be used only as an index for that purpose and not "limited to the particular characteristics of the tea district from which the standard comes." (Id.) By a subsequent circular it was directed "that the flavor may be that of a different district so long as it is equal in sweetness" (*Syn. Dec.* 18933, Feb. 7, 1898), the word "sweetness" being a trade term for the genuine tea flavor as distinguished from the smoky, sour, etc., flavors which sometimes affect it and are by some believed to be due to impurities.

It is urged (although this is a matter for the legislature rather than the court) that there is a possible hardship in the law, from the fact (as claimed by appellants) that the Secretary "can change the law governing any particular tea at any time by changing the standard," so that "the character of tea lawful to be imported when shipped may be in the meantime illegal when it arrives," thus enabling the Secretary "to control the supply and demand from time to time; to enact, alter, modify, and repeal from time to time, in his unlimited discretion, the rule which regulates commerce in teas." This is based upon a misapprehension. As in the case of many other commodities, there is a regular season for the purchase and importation of teas. The crop is an annual one, and each crop is purchased and imported (commencing in the late spring) long before any purchase is made from the crop of the following year. The statute is drawn with reference to this state of facts. The board of tea experts which prepares the standard samples of tea is appointed before February 15 of each year. This enables the standard samples to be prepared, examined, and passed upon by the Secretary of the Treasury in time to permit their shipment to the ports in the tea-producing countries before the commencement of the purchasing season. It is not a correct construction of the statute, if we read its wording and intent correctly (and it must be so construed as to be reasonable), that the Secretary of the Treasury has any power to raise or lower the standard during the season for which it is established. There is no provision for an alteration of standards once

established, nor could the intent of the act be effectuated if the standards supplied by the Secretary of the Treasury to importers and dealers for shipment abroad be different from the standards afterwards actually used in the examination of the teas which have been purchased in reliance thereon.

There is some liability to the commitment of error in the administration of a law by comparison of imported teas with the standards, but no more than in the administration of other laws and not sufficient to impair substantially the general satisfaction over the administration of this one.

It is claimed by some, although denied by others, that there is a difference in the grade of teas admitted to the country at different ports, owing to the personal equations of different examiners. There may be something in this respect calling upon the departmental appellate tribunal or Secretary of the Treasury for action; but such defects in practice under the law, if they exist, do not render the law itself invalid.

Some stress has been laid by the opponents of the law upon the argument that the powers given to the Secretary of the Treasury are subject to abuse. It would be impossible to administer the Government if powers susceptible to abuse were withheld from executive officers. While this power is susceptible of abuse, the probability of abuse is particularly small. Even were the seven tea experts, selected from all parts of the United States, to band together for any such purpose, their action would fail to receive the force of law did it not receive the approval of

the Secretary. The Secretary would hear the objections made, and if he found them well taken he could refuse to approve a recommendation to the board until the standards were reduced so as to admit the good but cheap grades of tea which are called for by the people. Tea is a commodity of almost universal consumption, especially among the poor. No Secretary of the Treasury and no board of tea experts will ever permit it to be set apart as a mere luxury for the rich.

For the above reasons it is respectfully submitted that the decree of the circuit court should be affirmed.

EDWARD B. WHITNEY,
Special Assistant to the Attorney-General.

JOHN K. RICHARDS,
Solicitor-General.

No. 232.

Reply Brf. of Atty. Gen.l of Petitioners

for Cert.

Filed Nov. 18, 1890.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM J. CRUICKSHANK ET AL.
v.
GEORGE R. BIDWELL. } No. 232.

REMARKS ON THE BRIEF SUBMITTED ON BEHALF OF WILLIAM J. SUTTFIELD ET AL.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIAM J. CRUICKSHANK ET AL.)
v.) No. 232.
GEORGE R. BIDWELL.)

REMARKS ON THE BRIEF SUBMITTED ON BEHALF OF WILLIAM J. BUTTFIELD ET AL.

Mr. Butterfield and his allies have attempted by a suit in the circuit court to obtain a definition of the word "quality" in the tea act of 1897. They are not satisfied with the definition given them by the circuit court of appeals (*Butterfield* v. *Bidwell*, 96 Fed. Rep., 328). The decision with which they are dissatisfied is not appealable, having been made upon an appeal from an interlocutory order. The case is, however, now pending in the circuit court upon demurrer to this bill of complaint, and may be brought here in due course for final determination.

Their present brief seems to be an attempt to obtain a preference of the case by a short cut, so as to save a year or so of delay. It seems to be an attempt to obtain *obiter dicta* for use at the Treasury Department.

It is not necessary for the purposes of this case to answer the various questions which have been mooted before the Treasury officials concerning scope of the word "quality" in the statute.

In the first place, the bill of complaint is so drawn as to raise only the question of constitutionality, and only the question whether the statute as a whole is unconstitutional. Appellant did not allege, as he was bound to do if any specific question as to "quality" were to be decided, that his goods were rejected for deficiency in that particular.

In the second place, the definition of the word "quality" affects only the construction of the act, not its constitutionality. It is conceded by all parties that Congress has the power to exclude any or all teas from our ports, and, in particular, that it has the power to exclude teas of quality so low as to be in its opinion unfit for use. Having the right to exclude teas, it may impose such conditions as it may think proper upon their admission. Examination of this statute—construing it, as is proper, in the light thrown upon it by the committee report upon which it was adopted by Congress—shows that Congress intended simply to exclude all teas which for any reason whatever are unfit for use, leaving the question of fact to be decided by the customs officers, guided by standards fixed by the Secretary of the Treasury and a body of experts. The only objection urged by Mr. Buttfield's counsel seems to be that Congress did not describe the degree of unfitness for use in definite language. But the degree of definiteness called for by this objection is entirely unnecessary under the cases of which *Field* v. *Clark* (143

U. S., 649) is the leading example. The statute discussed in that case authorized the President to impose duties upon the products of nations whose tariffs "in view of the free introduction of" certain articles "into the United States, he may deem to be reciprocally unequal and unreasonable." Two Presidents might differ most radically in their views of reciprocal equality and reasonableness, yet no test was provided by Congress whereby the courts could decide which was right in any given case. Whatever may be the scope of the word "quality" in this statute, the ascertainment of the degree of quality necessary to constitute fitness for use involves no greater range of discretion than the ascertainment of the degree of reciprocal inequality and unreasonableness of foreign tariffs.

The bill of complaint in the case now regularly before this court does not call for a construction of the word "quality," and I have not prepared myself to argue that point at the present time; nor have I regarded it as my duty to do so; but I submit for the assistance of the court, if it desires to examine into the arguments of Mr. Buttfield, the following extracts from the brief of the appellees at the circuit court of appeals in Mr. Buttfield's case:

(*a*) "The complainant concedes that if the word "quality" be given its natural meaning, it is fully as broad as we contend. His leading affiant, Mr. Lester, states its technical meaning in the tea trade to be as follows:

> Quality, as determined by the customs and usages of the tea trade, includes all the attributes of tea which affect the tea's market value, including style or appearance of dry leaf, size or brokenness of leaf,

flavor, strength, and body of cup or drinking quality of leaf itself, which depends on its youngness, soil in which it is grown, climatic influence, and season of the year in which it is picked, etc.

The term quality is a very familiar one in the English language. It is not synonymous with wholesomeness. It does not represent hygienic qualities. It represents the attributes of an article in their widest scope. No broader jurisdiction could be given over any article than by giving power to regulate its quality.

Webster gives the definition as follows: "The condition of being of such and such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

Worcester says: "The nature of a thing relatively considered; property of a thing; attribute."

The Century's corresponding definition is: "Degree of excellence or fineness; grade, as the food was of inferior quality; the finest quality of clothing."

There are many other derivative definitions in the dictionaries, but these are the definitions most closely applicable to the present case.

It being thus conceded that both the trade definition and the dictionary definitions of the word are broad enough to cover the meaning which the Treasury Department attaches to it, it follows that there is no ambiguity in the statute.

(*b*) Since, then, there is no ambiguity in the statute, and since it does not offend the moral sense or involve any injustice, oppression, or absurdity, it must be inter-

preted in accordance with its plain meaning, which can not be changed by any judicial rules of construction.

(*c*) Complainant argues that the word "quality" should be construed as if it read "wholesomeness." But an article without wholesomeness is an article without fitness for consumption. Hence the word "quality" would be given no meaning in the act if complainant's construction were adopted, and this would violate one of the cardinal rules of construction, stated in *Market Co.* v. *Hoffman* (101 U. S., 112, 115–6):

> It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that "a statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

The application of this rule is especially striking when it is borne in mind that the statute as originally drawn contained only the words "purity and fitness for consumption," and that the word "quality" was subsequently inserted by amendment.

(*d*) That the word "quality" should be given its ordinary trade meaning and that it was intended to have especial reference to the test by the taste of the infusion, is shown by the context. Section 7 of the statute ends with the following words:

> The purity, quality and fitness for consumption of the same shall be tested according to the usages

> and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Describing the three tests by infusion in boiling water, Mr. Phelan, chairman of the Board of Tea Experts of 1897 and 1898, says:

> The second of these tests is by the smell and taste of the liquid, which indicates the degree of strength of the article as well as the character of its flavor. This second test has during said period been generally known throughout the United States by the trade designation of the test for "cup quality" or "quality."

This statement is confirmed by Examiner McGay and by other experts of recognized standing, and is not disputed, although Mr. Phelan's general definition of "quality," is insisted by complainant and his expert to be *too narrow*.

[Mr. Phelan's definition is as follows: "The word quality has been for thirty years a general trade designation throughout the United States denoting the strength and character of the flavor of the tea. It is ascertained by the second of the tests aforesaid."]

(*c*) The statute is not a penal one, within the meaning of the rule of construction appealed to by complainant. The statute is remedial, and to be construed as such, notwithstanding that the tea must be destroyed to get rid of it, if the importer refuses to send it away within six months after its rejection. (See *United States* v. *Stowell*, 133 U. S., 1 and cas. cit.).

(*f*) The word "uniform" in the statute has no bearing on the question. It is not repugnant to the existence of a separate standard for each general class of teas, any more than constitutional provisions for uniformity of taxes are repugnant to the existence of separate taxes on separate subjects of taxation. Even were wholesomeness the sole object sought by this statute, the standard for green tea would have to differ from the standard for black.

(*g*) The main grievance of this complaint is that the Government interprets the statute as requiring a substantial degree of strength in teas imported. But in the drugs act, which has been in operation since 1848, the word "quality" involves a requirement of substantial strength (Rev. Stat., secs. 2933, 2935–6); and the legislative power to make such a requirement is well settled. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

There is nothing in this act to indicate that Congress meant anything less by the term "quality" than its meaning in the old and familiar statute just cited.

The other thing of which he complains with relation to the interpretation of the word "quality" is the requirement that foreign flavors, not belonging to tea, such as smoky and sour flavors, shall exclude the importation. This is really a safeguard of purity; for as it is often impossible here to prove affirmatively that foreign flavors are due to impurities, a general requirement of this kind is the only way in which impurities can be effectually shut out.

(*h*) The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may

be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context and not in the title. One of the latest expressions of this familiar rule is in *United States* v. *Oregon and California R. R. Co.* (164 U. S., 526, 541):

> The title is no part of an act and can not enlarge or confer powers or control the words of the act, unless they are doubtful or ambiguous. * * * The ambiguity must be in the context and not in the title to render the latter of any avail.

In *Hadden* v. *The Collector* (5 Wall., 107, 110) Mr. Justice Field said:

> At the present day the title constitutes a part of the act, but it is still considered as only a formal part. It can not be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.
>
> These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title (citing instances).

It is quite common for the title of a statute to be narrower than the statute itself, and the reason often is (as we shall show to be the fact in the present case) that the

original bill while in its progress through Congress is broadened by amendment without a corresponding amendment to the title.

Perhaps the most familiar instances in the Federal courts are in the subtitles or headings of the tariff acts, which are so often absurdly insufficient to cover the articles therein enumerated. Thus, sponges used to appear under the heading of "Chemicals, oils, or paints," and cork under "Flax, hemp, and jute." (21 Atty. Gen. Opin., 67; *Hollender* v. *Magone*, 149 U. S., 586, 591; *Seeberger* v. *Schlesinger*, 152 U. S., 581, 583.)

(*i*) That the word quality is to be given a broad significance, whether the ordinary dictionary definition or the usages of the trade be our authority for its meaning, is clearly shown by the history of the act. It is well settled that in construing an act not only is prior legislation *in pari materia* to be considered, but also it is important to examine the original form of the bill and the way in which the amendments thereto were inserted, for which purpose the Journals of Congress may be considered. (*Blake* v. *National Banks*, 23 Wall., 307; *Legal Tender Cases*, 12 Wall., at p. 559; *United States* v. *Burr*, 159 U. S., at p. 85.)

The former act *in pari materia* was the act of March 2, 1883, chapter 64 (22 Stat., 451), entitled "An act to prevent the importation of adulterated and spurious teas." The first section of this act prohibited the importation of "any merchandise for sale as tea adulterated with spurious leaf or with exhausted leaves, or which contain so great an admixture of chemicals or other deleterious substances as to make it unfit for use." The act pro-

vided for an examination of the merchandise "with reference to its purity and fitness for consumption" (sec. 2). "Exhausted leaves" were defined to "mean and include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means" (sec. 6). It will be noticed that the act treated the specific things prohibited under the first section as including whatever was inconsistent with the purity and fitness for consumption of the tea.

In practice the phrase "deleterious substances" came to have a very broad signification, including not only substances other than tea, but also tea leaves which had suffered by careless picking or bad curing; and customs officers were, as early as 1889, many years before the passage of the present act, cautioned to secure a strict examination of teas of this character. Assistant Secretary Tichenor directed the collector of this port on July 30, 1889 (Syn. Dec., 9534), as follows:

> The statements of the consul and the documents inclosed in his communication indicate that it is a well-recognized fact among dealers in China that Amoy oolongs are generally dirty, adulterated, carelessly picked, or poorly cured, and their reputation is so vile that all markets save that of the United States are now closed to them.
>
> A circular letter issued by Messrs. Russel & Co., of Amoy, speaks of these teas as the decayed vegetable matter of China, and states that it is difficult to understand how, under the existing inspection regutions, they can be dealt in.
>
> * * * * *

> Your attention is called to this matter in order that a strict scrutiny may be made at your port of all importations of this grade of teas, with a view to prevent the admission of teas which may be found to be in violation of the act prohibiting the importation of adulterated and spurious teas.

The act of 1883 contained no provision for the establishment of Government standards, and its administration was far from uniform, both on this account and because the act left so wide a discretion in the examiner as to what is "deleterious," for there is a very great difference of opinion as to the hygienic character of these low-grade teas, such as described in the Treasury circular above quoted.

The act of 1897 as originally introduced was drafted for the double purpose of establishing definite standards in the interest of uniformity and broadening the statute by omitting all phrases which might restrict the meaning of the term "fitness for consumption." The bill was introduced January 22, 1897, by Senator Hill, and bears the number 3581. It is entitled "A bill to prevent the importation of impure and unwholesome tea." It strikes out the words above quoted from the first section of the act of 1883 and substitutes therefor the words "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." Section 3 provided for the adoption of standards and deposit of samples, the standards so fixed "to be the standards for purity and fitness for consumption of teas permitted or sold within the United States." The

Secretary of the Treasury, through his power of confirming the recommendations of the board of tea experts, was thus made the arbiter of fitness for consumption as well as of purity; "fitness for consumption" was treated as equivalent to "wholesomeness;" and the word "unwholesome" was doubtless regarded as including everything which under the prior act had been considered "deleterious."

The bill was referred to the Committee on Commerce and amended by the committee in various respects. The only amendment important to the case at bar was the insertion of the word "quality" after the word "purity" at every one of the many points where the latter word occurred in the act. Doubtless the committee (whose report was confirmed by both houses of Congress) intended to add something to what was in the bill before—to enlarge the scope of the prohibitions of the act. The word was evidently carefully chosen. It can not have been chosen as a synonym for wholesomeness, because, first, it would have been simpler, more natural, and more effective to say simply "wholesomeness," and, second, because wholesomeness was already guaranteed by the phrase, "fitness for consumption."

(*j*) While we are not permitted to examine the debates of Congress, it is proper to examine the reports of Congressional committees, upon which reports the action of Congress was based (*The Delaware*, 161 U. S., 459, 472).

The Committee on Commerce of the Senate, in submitting the substitute bill which actually passed (Senate bill 3725), and which introduced the word "quality" at

so many points in the bill, presented a report drawn by Senator White of California (Senate Report 1527, Fifty-fourth Congress, second session, February 23, 1897). The report stated that the committee had taken evidence on the subject and had submitted the original bill to the Secretary of the Treasury, who reported a substitute practically identical to the one now presented.

The report shows clearly that while the unwholesomeness of the teas to be excluded was borne in mind as an important element, the effect of the law was intended to be still more sweeping, and to shut out the lowest grades of tea altogether as "unfit for use." Among the consequences of the law of 1883, the committee reported that "millions of pounds of tea unfit for use are being constantly admitted," while our people "are now drinking the lowest average grade of tea ever before known, *while many consumers are giving it up altogether.*" The remedy proposed is the establishment of standards of the "lowest grade of tea fit for use." The effect of the amendment, in addition to the securing of uniformity by the establishment of standards, is stated as follows:

> (4) The tea trade of the United States will be benefited by having trash, *which is ruining the business*, and which has for many years constituted the principal part of the surplus supply, effectually excluded.
>
> (5) The consumers of the United States will be protected as never before *from the imposition upon them of worthless rubbish*, and be sure of receiving an article fit for use.

The word "worthless" is evidently not used as the equivalent of "without present pecuniary value." No legislation against the latter defect is necessary. It is used as the equivalent of the prior phrase, "unfit for use." What is the test of unfitness? Plainly something broader than mere unwholesomeness. The quotations we have given show the test to be a two-sided one. Consumers were to be protected from being imposed upon with an article so low in grade that it can not hold a permanent place as an article of consumption; and on the other hand the trade were to be protected from the introduction of an article for sale under the name of tea which has the effect of reducing the consumption of tea in the United States.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

Statement of the Case.

of impure and unwholesome tea," and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law.

THIS is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing, on demurrer, a bill in equity brought by Cruickshank and others, copartners doing business in the city of New York, against George R. Bidwell, collector of customs for the port of New York.

The bill averred that complainants were engaged in importing teas from Japan into the United States; that during the month of November, 1897, they imported into the United States and entered at the custom house in the port of New York, several invoices of tea of the aggregate value of something over $4100; that they applied to defendant as collector of customs for permission to take possession of the goods, and the collector refused to permit them to do so, but retained the same in his own possession, claiming that he was thereunto authorized by the provisions of an act of Congress, approved March 2, 1897, c. 328, 29 Stat. 604, entitled "An act to prevent the importation of impure and unwholesome tea." This act is printed in the margin.[1]

[1] That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the person so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation or any other

Statement of the Case.

That defendant pretends that he is entitled "so to refuse to permit your orators to take possession of said teas and to dispose of the same, on the ground that samples of said teas, of

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cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports during the same at cost. All teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

each of said several invoices hereinafter set forth, have been taken by examiners appointed under the alleged authority of the said act of Congress, and compared with certain other samples of other teas selected by the Secretary of the Treas-

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SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality and fitness for consumption to the standards hereinbefore provided, and no reëxamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom house, unless on a reëxamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reëxamination by such board the tea shall be found to be inferior in purity, quality and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reëxamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reëxamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality and fitness for consumption of the same shall be tested according to the usages and cus-

ury of the United States, and set up as standard samples of teas under the alleged authority of the said act of Congress, and that the samples so taken from the said teas hereinafter set forth, were inferior in some or all of the respects designated in said act of Congress, either as to purity, quality or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States."

That defendant claims the right to retain the teas for six months, and then cause them to be destroyed, and demands that complainants shall give security satisfactory to him that

toms of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reëxamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect. 29 Stat. 604, c. 358.

if said teas shall be released to them, they will forthwith export said teas out of the limits of the United States, and will submit the invoices and various papers relating to said teas to be marked by defendant as teas "condemned under the laws of the United States."

The bill then specifically enumerated the entries of the teas, the warehouses in which they were, and their value respectively, and charged that said act of Congress was in all respects null and void and of no effect, because contrary to the provisions of the Constitution of the United States, in that the act "purports to delegate to the Secretary of the Treasury power and authority to legislate as to the quality, purity and fitness for consumption of the teas imported by your orators, and to authorize the defendant to seize, hold and destroy said teas, and deprive your orators of their property in the same without due process of law, and that in this suit the matter in dispute, to wit, the value of the said teas, and the right to import teas, exclusive of interest and costs, exceeds the sum or value of two thousand dollars, and the suit arises under the Constitution and laws of the United States."

It was further alleged that by reason of the matters set forth and the insistence of defendant that he is entitled to hold possession and control of the goods under authority of the act of Congress, "for the reason that the said examiners, after examination made pursuant to said statute, have declared the said teas to be inferior in the respects set forth in the said act of Congress, or some of them, to the standards fixed and selected by the Secretary of the Treasury, your orators will suffer irreparable damage; that the insistence of the defendant of his right to stamp the invoices and papers relating to the importation of said teas as condemned under the laws of the United States, renders the said teas worthless for export, and entry or sale in the markets of other countries, and that the said claim of the defendant that the said teas cannot be lawfully taken from the said warehouses, renders the said teas unsalable and worthless in the market, for the reason that dealers will not purchase or handle the said goods under the cloud or threat of illegality regarding the same

created by such insistence and claim on the part of the defendant."

The bill continued: "Your orators further show that your orators purpose and intend to import from time to time other invoices of teas into the United States, and that the said defendant threatens and intends to seize and hold such teas, and take possession and control of the same, and refuse your orators possession of the same, in the same manner and under the same claim of authority of said act of Congress, as the said defendant has heretofore made and set up with regard to the teas hereinbefore set forth, and that your orators' right to import and deal in teas is thereby destroyed and taken away."

That complainants "do not set up or allege as ground for denying the right of the defendant so to hold and deal with said teas, as hereinbefore set forth, any defect, omission or irregularity in the proceedings by the examiners and appraisers with regard to said teas, but solely on the ground that the act of Congress hereinbefore referred to . . . is unconstitutional and void, and confers no authority upon the defendant, and creates no right in the defendant to refuse to permit your orators to take possession of the said teas and introduce them into, and sell them in, the United States." And further, that complainants had complied in all respects with the requirements of law as to the entry of the teas in the custom house at the port of New York; that there was no further act required by law of complainants to entitle them to take possession and dispose of the same; and that complainants "are without any adequate remedy at law."

The bill prayed for injunction restraining defendant "from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to take possession of the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words, 'condemned under the laws of the United States,' or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession or authority

CRUICKSHANK *v.* BIDWELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 232. Argued November 10, 13, 1899. — Decided January 15, 1900.

The mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction; and in this case the averments of the complainants' bill did not justify such an interference with executive action.

The seizure of importations of teas purchased after the approval of the act of March 2, 1897, c. 358, entitled "An act to prevent the importation

relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress;" and for general relief.

Mr. John S. Davenport for appellants.

Mr. Edward B. Whitney for appellee. *Mr. Solicitor General* was on his brief.

Mr. James L. Bishop by leave of court filed a brief on behalf of William J. Butterfield and others.

Mr. Chief Justice Fuller delivered the opinion of the court.

Complainants sought by this bill to enjoin an officer of the United States from the discharge of duties expressly imposed upon him by an act of Congress on the ground of its unconstitutionality. We are clear that its averments did not justify such an interference with executive action.

In *Noble* v. *Union River Logging Railroad Company*, 147 U. S. 165, the jurisdiction was sustained, but the Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appeared that the only remedy was through equity interposition. *New Orleans* v. *Paine*, 147 U. S. 261, 264. But we are unwilling to extend that precedent.

It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction. *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Pullman's Palace Car Company*, 139 U. S. 658; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *Pittsburg &c. Railway Company* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269. As

remarked by Mr. Justice Bradley in *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214, the sixteenth section of the Judiciary Act of 1789, now section 723 of the Revised Statutes, declaring "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law" "certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury. The one head is well illustrated by *Union Pacific Railway Company* v. *Cheyenne*, 113 U. S. 516, and *Smyth* v. *Ames*, 169 U. S. 466, 517; and the other by *Watson* v. *Sutherland*, 5 Wall. 74; cited by counsel.

But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.

The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The matter in dispute was averred to be "the value of the said teas and the right to import teas."

Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. The official character of the collector, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof would not constitute a defence, if the act were unconstitutional. There was no intimation that the collector would be unable to respond in judgment, and, moreover, section 989 of the Revised Statutes provides that when a recovery is had in any suit or proceeding against a collector

for any act done by him, probable cause being certified, "the amount recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." *The Conqueror*, 166 U. S. 110, 124.

Nor was there any averment of injury by reason of the condemnation of these teas other than the loss of the teas themselves.

The allegations in respect of apprehended deprivation of the right to import and deal in teas were that complainants intended to import from time to time other invoices of teas and that the collector threatened to take possession of and hold them in the exercise of authority under the act of Congress in the same manner as the particular teas in question. This was in effect to assert a vested right to import and deal in teas which might be impure and unwholesome, and which were at all events, inferior to the uniform standards "of purity, quality and fitness for consumption" fixed by the Secretary. The law does not prohibit the importation of teas coming up to the standards, and it is difficult to perceive the elements of irreparable injury in the denial of permission to import inferior teas.

Manifestly the seizure of importations of teas purchased after the approval of the act and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law.

As no tenable basis for equity interposition was shown, the decree of the Circuit Court dismissing the bill was rightly entered.

Decree affirmed.